Supreme Court, U.S.
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No. 04- 04-726

IN THE

Supreme Court of the United States

MOYE, O'BRIEN, O'ROURKE, HOGAN & PICKERT,

Petitioner,

v.

NATIONAL RAILROAD PASSENGER CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This Petition presents three questions for the Court's consideration.

1. Whether a Government agency may withhold documents responsive to a Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, request when the documents have only a reasonable nexus to a claimed deliberative process?

2. Whether the Eleventh Circuit erred when it applied a "process" based analysis rather than the document specific analysis previously required by this Court's deliberative process privilege decisions?

3. Whether the Eleventh Circuit erred when it reversed the district court based on a deliberative process that the Respondent neither asserted nor proved at trial?

CORPORATE DISCLOSURE STATEMENT

The Petitioner was a partnership.

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OPINIONS AND ORDERS ENTERED BELOW

Two orders of the United States District Court for the Middle District of Florida and two opinions of the United States Court of Appeals for the Eleventh Circuit are at issue in this petition.

The first district court order, dated August 18, 2003, is unreported. App., *infra*, 44a. The second district court order, dated October 22, 2003, is also unreported. App., *infra*, 31a.

The first opinion of the United States Court of Appeals for the Eleventh Circuit, dated July 14, 2004, which reversed the district court's August 18, 2003 order through a novel, overly broad interpretation of the deliberative process privilege, is reported at *Moye, O'Brien, O'Rourke, Hogan & Pickert v. National Railroad Passenger Corporation*, 376 F.3d 1270 (11th Cir. 2004) ("*Moye I*"). App., *infra*, 9a. The Eleventh Circuit's order denying the subsequent Petition for Rehearing *En Banc* is unreported. App., *infra*, 75a.

The second opinion of the United States Court of Appeals for the Eleventh Circuit, dated September 3, 2004, which reviewed the district court's October 22, 2003 order and applied *Moye I*'s erroneous interpretation of the deliberative process privilege, is unreported ("*Moye II*"). App., *infra*, 1a. No rehearing was sought for *Moye II*.

JURISDICTION

Moye I, App., *infra*, 9a, was filed July 14, 2004. The subsequent Petition for Rehearing *En Banc* was denied September 14, 2004. App., *infra*, 75a. *Moye II* was filed September 3, 2004. App., *infra*, 1a. No rehearing was sought for *Moye II*.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(l).

STATUTES INVOLVED

The Freedom of Information Act ("FOIA"), provides, in pertinent part:

> (a) Each agency shall make available to the public information as follows:
>
> * * *
>
> (3)(A) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, and except as provided in subparagraph (E), each agency, upon any request for records which (i) reasonably describes such records and (ii) is made in accordance with published rules stating the time, place, fees, (if any), and procedures to be followed, shall make the records promptly available to any person.

5 U.S.C. § 552(a)(3)(A).

The FOIA also provides, in part:

> (b) This section does not apply to matters that are —
>
> * * *
>
> (5) Inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency . . .

5 U.S.C. § 552(b)(5).

STATEMENT OF THE CASE

On May 1, 2001, the petitioner, Moye, O'Brien, O'Rourke, Hogan & Pickert ("Moye O'Brien"), sent a FOIA request to the respondent, National Railroad Passenger Corporation ("Amtrak"). Moye O'Brien's requests sought records associated with routine financial audits performed by Amtrak or Amtrak's Office of Inspector General (the "audit work papers"). The requests also sought records relating to anchor bolts that were used in the construction of a system that electrified portions of Amtrak's rail lines (the "anchor bolt documents").

Amtrak declined to produce certain responsive records and Moye O'Brien sued Amtrak, pursuant to 5 U.S.C. § 552(a)(4)(B), to compel disclosure. Amtrak answered and reasserted its claim that the audit work papers and the anchor bolt documents were exempted from disclosure by, *inter alia*, the deliberative process privilege component of FOIA Exemption (b)(5).

The parties filed cross-motions for summary judgment regarding, *inter alia*, Moye O'Brien's entitlement to the requested documents and Amtrak's assertion of the deliberative process privilege. At summary judgment, the district court[1] believed that Moye O'Brien was entitled to the requested records because Amtrak failed to prove the applicability of its asserted privileges. Nevertheless, in an effort to give Amtrak a second chance, the district court denied the cross-motions for summary judgment and held bench trials to consider anew Moye O'Brien's entitlement to the requested documents and Amtrak's privilege claims. The district court tried the question of Moye O'Brien's entitlement to the audit working papers separately from the question of Moye O'Brien's entitlement to the documents relating to anchor bolts.

"Moye I" — Exemption (b)(5) and the Audit Work Papers

On July 28, 2003, the district court held a bench trial to determine whether the deliberative process privilege (Exemption (b)(5)), *inter alia*, exempted the audit work papers from disclosure under the FOIA. In its post-trial order dated August 18, 2003, the district court found in favor of Moye O'Brien concluding that "Amtrak failed to sustain its burden of proving that the withheld working papers are within the deliberative process privilege." App., *infra*, at 71a.

Amtrak appealed the district court's August 18, 2003 order to the United States Court of Appeals for the Eleventh Circuit. The Eleventh Circuit, in an opinion dated July 14, 2004, reversed the district court and remanded the case.

1. The parties consented to trial before a magistrate judge. The magistrate judge is hereinafter referred to as the "district court."

App., *infra*, at 30a. *Moye I* included three significant legal errors. First, the *Moye I* court erred when it concluded that the deliberative process privilege protects documents that have only a "reasonable nexus" to a claimed deliberative process. In so holding, the *Moye I* court eliminated the well-established requirement that a privileged document was a direct part of the deliberative process in that it makes recommendations or express opinions on legal or policy matters.

Second, the *Moye I* court erred when it applied an improper "process" based analysis that considered the documents in the broad general context of Amtrak's audit process. The "process" based analysis does not specifically analyze whether *each document* withheld by Amtrak is, in fact, deliberative and predecisional.

Third, the *Moye I* court erred when it improperly allowed Amtrak to change its case on appeal. At trial, Amtrak claimed that the deliberative process at issue was Amtrak auditor Gary Glowacki's decision whether to issue a final audit report. App., *infra*, at 60a. Amtrak's evidence focused on Mr. Glowacki's process of deciding whether to issue a final audit report. App., *infra*, at 58a. Moye O'Brien cross-examined Amtrak regarding Mr. Glowacki's deliberative process and, based on the evidence at trial, the district court concluded that Amtrak failed to prove its case.

In the circuit court, Amtrak recast its case and claimed that the deliberative process at issue was Amtrak's audit process rather than Mr. Glowacki's decision whether to issue a final audit report. *See* App., *infra*, at 26a. The Eleventh Circuit reversed the district court and directed a judgment in favor of Amtrak based on Amtrak's newly asserted deliberative process. It did so even though Moye O'Brien did not get to test this claim at trial and the district court did not consider the claim at trial.

On August 4, 2004, Moye O'Brien filed a Petition for Rehearing *En Banc* and sought further review of *Moye I*. The Eleventh Circuit denied Moye' O'Brien's subsequent Petition for Rehearing *En Banc* on September 14, 2004.

"Moye II" — Exemption (b)(5) and the Anchor Bolt Documents

On September 8 and 9, 2003, the district court held a bench trial to determine Amtrak's claim that the deliberative process privilege, *inter alia*, exempted documents responsive to the anchor bolt requests from the FOIA. Based upon the evidence at trial and an *in camera* review of the withheld records, the district court, in an order dated October 22, 2003, rejected Amtrak's deliberative process privilege claim. The district court found that Amtrak failed to prove the existence of its claimed deliberative process and that the documents it sought to withhold were predecisional and deliberative. App., *infra*, at 35a-39a.

Amtrak appealed the district court's October 22, 2003 order to the United States Court of Appeals for the Eleventh Circuit. In an opinion dated September 4, 2004, the Eleventh Circuit reversed the district court's October 22, 2003 order and remanded the case for further proceedings consistent with *Moye I*. In reversing the district court, *Moye II* adopted the faulty analysis of *Moye I*.

REASONS FOR GRANTING THE PETITION

I. The Interpretation Of The FOIA And Its Exemptions Are Matters Of Profound Public Importance.

In a representative democracy, the citizens possess a fundamental right to know "what the Government is up to." *National Archives and Records Admin. v. Favish*, 124 S. Ct. 1570, 1580 (2004). The FOIA enables citizens to learn what the Government is up to by requiring Government agencies to disclose documents in their possession. *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978) ("The basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed."). Overbroad interpretations of the FOIA's exemptions prevent citizens from learning what their Government is up to by increasing the amount of information that the Government may withhold. Indirectly then, overbroad interpretations of the FOIA are harmful to our representative democracy and are, necessarily, matters of profound public importance that should be reviewed by this Court. In this case, the need for certiorari review is paramount because the Eleventh Circuit's interpretations of the deliberative process privilege in *Moye I* and *Moye II* are so overbroad that the privilege effectively eviscerates the FOIA.

II. The Court Interprets FOIA's Exemptions Narrowly To Preserve The FOIA's Obligation Of Disclosure.

The FOIA enables the governed to become informed by giving them a broad right to inspect and copy the Government's documents. 5 U.S.C. § 552(a)(2). At the same time, the FOIA identifies those limited circumstances when the Government may refuse to disclose requested documents. *See* 5 U.S.C. § 552(b).

Discussing the relationship between the FOIA's disclosure obligation and the FOIA's exemptions, this Court has stated:

> **Without question, the Act is broadly conceived. It seeks to permit access to official information long shielded unnecessarily from public view** . . . Subsection (b) [the FOIA exemptions] is part of this scheme and represents the congressional determination of the types of information that the Executive Branch must have the option to keep confidential, if it so chooses. As the Senate Committee explained, it was not 'an easy task to balance opposing interests, but it is not an impossible one either . . . Success lies in providing a workable formula which encompasses, balances, and protects all interests, **yet places emphasis on the fullest possible disclosure**.'

E.P.A. v. Mink, 410 U.S. 73, 80 (1973) (quoting S. Rep. No. 813, p. 3.); *see also Department of the Interior and Bureau of Indian Affairs v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 7-8 (2001) ("[FOIA's] limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act. . . ."); *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 136 (1975) ("As the Act is structured, virtually every document generated by an agency is available to the public in one form or another, unless it falls within one of the Act's nine exemptions.").

This Court recognized, long ago, that the "exemptions . . . are plainly intended to set up concrete, workable standards for determining whether particular material may be withheld or must be disclosed." *Mink*, 410 U.S. at 79. "Conflicting

claims over . . . documents", like those presented by the instant case, "must be considered" in "the context of the Act's attempt to provide a 'workable formula' that 'balances, and protects all interests'". *Id.* at 80.

This Court's deliberative process privilege jurisprudence has consistently implemented Congress's intent and protected the delicately crafted balance of the FOIA's statutory scheme. This Court has preserved the FOIA's statutory scheme by limiting the scope of the FOIA's exemptions, particularly the deliberative process privilege. *Mink*, 410 U.S. at 87 ("the privilege that has been held to attach to intergovernmental memoranda clearly has finite limits . . ."). In *Mink*, 410 U.S. at 93, this Court recognized that the deliberative process privilege only permits the Government to withhold documents that "are purely advisory and contain no separable, factual information." In *Sears*, 421 U.S. at 148-49, and *Renegotiation Board v. Grumman Aircraft Eng'g Corp.*, 421 U.S. 168, 184-85 (1975), the Court recognized that the deliberative process privilege does not protect final opinions, is limited to documents that are predecisional and deliberative, and that the deliberative process privilege analysis is document specific.

The Eleventh Circuit's decisions in *Moye I* and *Moye II* are contrary to this Court's prior decisions and the FOIA's policy of disclosure because they unnecessarily broaden the scope of the deliberative process privilege. Indeed, by adopting the "reasonable nexus" test and applying a "process" based analysis, *Moye I* and *Moye II* have created an overbroad privilege that allows the Government to withhold essentially any document in its possession.

III. This Court's Certiorari Review Is Necessary To Correct The Eleventh Circuit's Erroneous Determination That Documents Having Only A Reasonable Nexus To A Deliberative Process Are Privileged.

The Eleventh Circuit unnecessarily broadened the scope of the deliberative process privilege by holding that documents that have only a "reasonable nexus" to a claimed deliberative process are privileged. App., *infra*, at 28a-29a; *see also* App., *infra*, at 6a-7a. Under the "reasonable nexus" test, documents that are merely peripheral to, or immaterial to, agency decision-making become privileged notwithstanding their insignificance to an agency's deliberative process.

Neither *Sears* nor *Renegotiation Board* considered whether the deliberative process privilege should protect documents that are either peripheral to, or do not play a material role in, a deliberative process. *Sears* and *Renegotiation Board* are silent on the issue because in those cases it was undisputed that **the agency's final decision-makers actually used the withheld documents in their decision-making processes**. Thus, there was no question whether the documents at issue were peripheral or immaterial with regard to the claimed deliberative processes.

Though this Court has not considered the question, some of the circuit courts have. Those courts concluded that documents that are peripheral to agency decision-making or do not play a material role in a claimed deliberative process should not be considered privileged. *Grand Central P'ship, Inc. v. Cuomo*, 166 F.3d 473, 482 (2d Cir. 1999) (rejecting application of privilege to "peripheral" documents); *Ethyl Corp. v. EPA*, 25 F.3d 1241, 1248 (4th Cir. 1994) (same); *Vaughn v. Rosen*, 523 F.2d 1136, 1143-44 (D.C. Cir. 1975) (requiring documents

to be a direct part of the claimed deliberative process). The Fourth Circuit succinctly summarized this limitation on the scope of the privilege when it stated that:

> **The privilege does not protect a document which is merely peripheral to actual policy formulation**; the record must bear on the exercise of policy-oriented judgment. **Material which predates** a decision chronologically, **but did not contribute to that decision, is not predecisional in any meaningful sense.**

Ethyl Corp., 25 F.3d at 1248 (internal quotation marks omitted, emphasis added).

Prior to its decisions in *Moye I* and *Moye II*, the Eleventh Circuit also recognized that the deliberative process privilege does not extend to documents that are peripheral to, or not a material part of, the agency's decision-making process. The Eleventh Circuit expressed its limitation on the privilege's scope slightly differently than the Second and Fourth Circuits. It limited the privilege by requiring the documents at issue to have been a "direct part" of the deliberative process at issue. *Florida House of Representatives v. United States Dep't of Commerce*, 961 F.2d 941, 945 (11th Cir. 1992); *Nadler v. United States Dep't of Justice*, 955 F.2d 1479, 1490-91 (11th Cir. 1992).[2]

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2. This Court disapproved parts of *Nadler* relating to Exemption 7. *United States Dep't of Justice v. Landano*, 508 U.S. 165, 170 (1993). This Court expressed no opinion regarding the parts of *Nadler* that address the deliberative process privilege.

The Eleventh Circuit drew its "direct part" test from the D.C. Circuit's seminal deliberative process privilege case, *Vaughn v. Rosen*. *See Florida House of Representatives*, 961 F.2d at 945 (citing *Vaughn v. Rosen*); *Nadler*, 955 F.2d at 1491 (same). In *Vaughn*, 523 F.2d at 1139-1140, the Government claimed that reports prepared by the Bureau of Personnel Management were excepted from FOIA's disclosure requirement because they were records of the agency's deliberative process. Each report included sections that evaluated the subject agency's management performance and sections that made recommendations to the subject agency for improvements or changes. *Id.* at 1140. The Government sought to withhold the evaluative **and** the recommendatory portions of the reports, arguing that: "**the evaluative portions of the reports constitute an integral part of an ongoing, pre-decisional deliberative process** because . . . they play a consultative role by which the agency changes its personnel policies, rules, regulations and standards. . . ." *Id.* at 1143 (emphasis added).

Rejecting the Government's argument, the *Vaughn* court recognized that:

> **It is not enough to assert, in the context of Exemption 5, that a document is used by a decisionmaker in the determination of policy.** Unevaluated factual reports or summaries of past administrative decisions are frequently used by decisionmaker in coming to a determination, and yet it is beyond dispute that such documents would not be exempt from disclosure. **Rather, to come within Exemption 5, the document must be a direct part of the deliberative process in that it makes recommendations or expresses opinions on legal or policy matters.**

Id. at 1143-44 (emphasis added).

In *Moye I* and *Moye II*, the Eleventh Circuit receded from the "direct part" test and improperly broadened the scope of the deliberative process privilege by adopting its "reasonable nexus" test. Instead of concluding that a document is privileged if it is a direct part of deliberative process, the Eleventh Circuit concluded that:

> **[I]n order for the deliberative process privilege to apply, the decision-making process *must bear a reasonable nexus* to the documents sought.**

App., *infra*, at 28a-29a (emphasis added); *see also* App., *infra*, at 6a-7a (adopting *Moye I* analysis).

Under a "reasonable nexus" test, the scope of the deliberative process privilege becomes overlybroad. Documents are now privileged without regard to their contents or roles in the claimed deliberative process. The Government's ability to withhold documents is now only constrained by the Government's ability to articulate a deliberative process and a "reasonable nexus" between that process and a document that it wants to withhold. The tremendous expansion in the volume of materials that are now privileged upsets the balance of FOIA's statutory scheme by creating a statutory exception, the deliberative process privilege, that is so broad that the exception swallows the FOIA whole.

The overbreadth of the privilege under a "reasonable nexus" test comes into sharp focus when the reasonable nexus test and the direct part test are applied to a single set of facts and the different outcomes are compared. Under the "direct part" test, which was applied by the district court at trial, Amtrak's deliberative process privilege claim failed because

Amtrak did not prove that the withheld documents were *actually* part of a deliberative process *in that they make recommendations on legal or policy matters*. App., *infra*, at 68a. The documents themselves belied Amtrak's claim that the documents made recommendations on legal or policy matters.

Under the "reasonable nexus" test applied by the circuit court, however, Amtrak gained the ability to make a *prima facie* case for the privilege by asserting that its entire audit process was a deliberative process and that all of its withheld documents had some role in that deliberative process. *See* App., *infra*, at 25a-28a. Documents suddenly became deliberative regardless of whether they: (1) were actually incorporated any advice or recommendations; (2) were actually created to assist a decision-maker rather than as part of an on-going, routine government process; (3) had any identifiable role in a decision actually made; or (4) actually gave advice or made recommendations.

The overbreadth of the "reasonable nexus" test and the propriety of the narrower "direct part" test also become apparent when the two tests are considered in the light of the policies underlying the FOIA and the deliberative process privilege. Previously, this Court recognized that the purpose of the deliberative process privilege is to prevent injury "to the consultative functions of government . . ." *NLRB*, 421 U.S. at 149. It also observed that the privilege safeguards "the policy of open, frank discussion between subordinate and chief concerning administrative action", *Mink*, 410 U.S. at 87, but that it was not intended "to protect Government secrecy pure and simple. . . ." *Klamuth*, 532 U.S. at 9.

The direct part test safeguards the "consultative functions of government" because it protects documents that are *truly* part of a deliberative process. Moreover, the direct part test provides the courts with a reliable means to sort the truly deliberative documents from the non-privileged documents that the Government is hiding under blanket assertions of the privilege. The reasonable nexus test, however, lends itself to blanket assertions of the privilege by removing any objective factors for courts to consider when evaluating the Government's privilege claim.

Additionally, the direct part test ensures that subordinates can discuss matters with their superiors frankly. The direct part test protects such communications because the direct part test does not compel disclosure of a subordinate's advice or recommendations. Under the direct part test, a subordinate's advice or recommendations will remain privileged if the Government substantiates its privilege claim by proving that the subordinate has an advisory role in a claimed deliberative process and that the document that the Government seeks to withhold *actually* reveals the subordinate's advice. The reasonable nexus test, however, fosters Government secrecy because it fails to distinguish protected advisory communications from unprotected communications.

The Eleventh Circuit's "reasonable nexus" test improperly expands the scope of the deliberative process privilege and is contrary to the policies underlying the FOIA. This Court's certiorari review is necessary to strike down the "reasonable nexus" test and restore the balance of the FOIA's statutory scheme.

IV. This Court's Certiorari Review Is Necessary To Clarify That Courts Should Apply A Document Specific Analysis When Considering Whether Documents Are Protected By The Deliberative Process Privilege.

Sears and *Renegotiation Board* indicate that the deliberative process privilege analysis is document specific. *Sears*, 421 U.S. at 149 ("it is reasonable to construe Exemption 5 to exempt those documents, and only those documents . . ."); *Renegotiation Board*, 421 U.S. at 184-185 ("the issue in this case is whether the Division Reports and the Regional Board Reports fall within Exemption 5 . . ."). Notwithstanding this Court's clear mandate for a document specific test, the Eleventh Circuit erred by adopting a "process" based analysis. *See Moye I*, App., *infra*, at 26a (reversing because the district court did not "view[] the audit process as a whole"); *Moye II*, App., *infra*, at 7a (reversing because the district court did not "view the documents as they relate to the entire deliberative process in which [Amtrak] is engaged").

Under the "process" based analysis applied in *Moye I* and *Moye II*, the Government can improperly withhold any document, regardless of whether the document ***itself*** is predecisional and deliberative, if the document is simply characterized as an "element" of some larger "deliberative process." Characterizing a document as an "element" of a larger "deliberative process" is unjustifiably simple because, under *Moye I* and *Moye II*, the Government only needs to establish a reasonable nexus between the document and the claimed "deliberative process".

The "process" based analysis adopted in *Moye I* and *Moye II* conflicts with the document specific analysis that this Court required in *Sears* and *Renegotiation Board*. It is also contrary to the policies underlying the FOIA because the "process" based analysis broadens the scope of the privilege to such an extent that the privilege now enables the Government to completely avoid its FOIA disclosure obligations. In this regard, the question of whether the deliberative process privilege extends to documents associated with discrete, routine decisions simply because the discrete decisions are characterized as "parts" of a larger "deliberative process" is a matter of profound public importance.

The conflict between this Court's document specific analysis and the Eleventh Circuit's "process" based analysis becomes apparent when the "process" based analysis and the document specific analysis are applied to the facts of *Moye I*. Under this Court's document specific test, which the district court applied, Amtrak's privilege claim failed because the *individual documents* that Amtrak sought to withhold were not, *themselves*, predecisional and deliberative. App., *infra*, at 68a. However, as seen *Moye I*, the circuit court's application of a "process" based analysis allowed Amtrak to transform those non-privileged documents into privileged documents by simply characterizing them as components of a larger "deliberative process". App. *infra*, at 25a-28a. Under the "process" based analysis, all documents, without regard to their particular contents, become deliberative and exempt from FOIA by simply associating them with a claimed deliberative process.

Application of the "process" based analysis in the context of other Government agencies illustrates how the "process"

based analysis creates a deliberative process privilege that will swallow the FOIA. Under the "process" based analysis, any agency can assert that any of its work is part of a "process," and that the "process" is deliberative simply because it involves a series of discretionary choices. An agency can then assert the deliberative process privilege for documents that are only peripherally related to the "process" leaving the scope of the privilege undefined and, perhaps, all encompassing. In the end, any Government agency could apply this "analysis" to any of its work and all documents in the agency's possession become privileged and exempt from the FOIA. The deliberative process privilege could thus become the tool that agencies use to circumvent the FOIA's disclosure obligations and the FOIA would cease to have a purpose.

In *Vaughn*, 523 F.2d at 1145, the court rejected a "process" based analysis similar to that adopted by the Eleventh Circuit. The *Vaughn* court discussed the flaws of a "process" based analysis stating:

> The Government appears to argue that this entire process of management appraisal, evaluation, and recommendations for improvement is a seamless whole, that it **is in its entirety a deliberative process, and that it is this process which the Government seeks to protect** as an ongoing continuous affair. On this view, starting when the Commission's staff initiates a survey of an agency, when it notes down significant facts of its operation, compares these with personnel and other management directives, evaluates what has been observed, until it formulates these evaluations into conclusions which are usually put

as recommendations for improvement to the surveyed agency **all would be a part of a deliberative process. As such it would be protected under Exemption 5; to make any of it subject to disclosure is to do violence to the protection written in Exemption 5.**

We cannot accept this. If we consider this entire continuous ongoing process of management appraisal, beginning with the action of the Commission's staff inquiries through the final recommendations to the subject agency and its final action thereon, **as a deliberative process, then surely we would be interpreting Exemption 5 to protect too much. The phrase "management process" or "personnel improvement process" would swallow up a substantial part of the administrative process, and virtually foreclose all public knowledge regarding the implementation of personnel policies in any given agency. . . .**

* * *

In another respect the proposed Government interpretation seeks to protect too much, i.e., it assumes that the [Government] recommendations, which it seeks to protect as part of continuous deliberative process, eventually always result in final decisions and actions by the surveyed agency which can be made public. After the [Government] transmits its evaluations and recommendations to the agency surveyed, there is no legally enforceable

> obligation on the subject agency to take any action at all. **Those with some knowledge of the daily functioning of the bureaucracy may surmise that an unknown number of these recommendations simply go into the files and rest peacefully there, with no action which the Government here would define as final and subject to disclosure ever being taken at all.**
>
> **Thus, the Government's characterization of this mass of material it seeks to protect as the "deliberative process" would result in a huge mass of material being forever screened from public view because the administrative bureaucracy had never reached a "final" decision on the management matters involved.** The public has an interest in decisions deferred, avoided, or simply not taken for whatever reason, equal to its interest in decisions made, which from their very nature may more easily come to public attention than those never made.
>
> * * *
>
> **Exemption 5 is designed to protect subordinate's advice to superiors, it is designed to protect *a true deliberative process* usually leading up to final decisions. If we construed Exemption 5 as broadly as the Government seeks to do here, we would go a long way toward undercutting the entire Freedom of Information Act.**

Id. at 1145-46 (emphasis added).

Unlike the "process" based analysis, the document specific test maintains the balance of the FOIA's statutory scheme. By requiring the Government to make a showing as to each particular document that it seeks to withhold, the document specific test ensures that the Government has an appropriately limited safe harbor for developing law or policy and that citizens have full access to all other documents.

The Eleventh Circuit's "process" based analysis is an overlybroad construction of the deliberative process privilege that upsets the balance of the FOIA's statutory scheme. This Court should protect the balance of the FOIA's statutory scheme by granting the Petition and exercising its authority to reverse the Eleventh Circuit's erroneous "process" based analysis.

V. The Eleventh Circuit's Decision To Allow Amtrak To Argue A Previously Unasserted Deliberative "Process" Was Such A Serious Departure From The Accepted And Usual Course Of Judicial Proceedings That This Court Should Exercise Its Supervisory Power.

In *Moye I*, the district court found, based on the evidence presented at trial, that:

> **The only deliberative process that Amtrak relies upon is the process by which Glowacki makes a decision whether to issue a final audit report.**

App., *infra* at 60a (emphasis added).

On appeal, Amtrak cast aside Mr. Glowacki's deliberative process in favor of a new, previously unasserted deliberative process — Amtrak's entire audit "process." App., *infra*, at 26a. The *Moye I* court inexplicably allowed Amtrak to recast its case on appeal. *See Id.*

The *Moye I* court erred when it considered an argument not previously presented to the district court. The law of this Court is clear — the Court will not consider an argument that was not previously presented to the lower courts. *Sims v. Apfel*, 530 U.S. 103, 108-09 (2000). The *Sims* court explained the rationale for this rule stating:

> Ordinarily an appellate court does not give consideration to issues not raised below. For our procedural scheme contemplates that parties shall come to issue in the trial forum vested with authority to determine questions of fact. This is essential in order that parties may have the opportunity to offer all the evidence they believe relevant to the issues which the trial tribunal is alone competent to decide; **it is equally essential in order that litigants may not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence.**

Id. (quoting *Hormel v. Helvering*, 312 U.S. 552, 556 (1941) (emphasis added).

The harm identified by *Sims* occurred in the instant case. In *Moye I*, the Eleventh Circuit determined that Amtrak was entitled to judgment in its favor based upon its new theory of the case and reversed and remanded the proceeding with

judgment for Amtrak. It did so even though Moye O'Brien had not been given an opportunity to test Amtrak's evidence in support of its new theory. By reversing and remanding, the Eleventh Circuit denied Moye O'Brien due process.

The circuit court apparently relied on *Sears*, 421 U.S. at 151-52 n.18, as its authority for allowing Amtrak to recast its deliberative process on appeal. App., *infra* at 25a-26a. Citing *Sears* for the proposition that (1) the government does not have to identify a specific decision; and that (2) the deliberative processes that are privileged may include when "Agencies are . . . engaged in a continuing process of examining their policies. . . .", *id.* (citing *Sears*, 421 U.S. at n.18), the Eleventh Circuit simply concluded that the district court erred by not viewing Amtrak's "entire auditing process as a whole", App., *infra*, at 26a.

The circuit court's justification for permitting Amtrak to recast its case fails because *Sears* is wholly inapposite to this case. *Sears* does not apply because Amtrak identified a decision at trial (Mr. Glowacki's decision whether to issue a final audit report) and *disclaimed* the involvement of any policies. Thus, this is not a case were Amtrak was claiming a decision in a "continuing process of examining policies . . ."

Allowing Amtrak to change its case on appeal and then directing judgment in Amtrak's favor based upon the new theory without providing Moye O'Brien a chance to test Amtrak's evidence was such a serious departure form the accepted and usual course of proceedings that this Court should grant this Petition and exercise its supervisory power.

CONCLUSION

The Court should grant Moye O'Brien's Petition for Writ of Certiorari and review *Moye I* and *Moye II*.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT FILED SEPTEMBER 3, 2004

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 03-15535

D. C. Docket No. 02-00126 CV-ORL-KRS

MOYE, O'BRIEN, O'ROURKE, HOGAN & PICKERT,

Plaintiff-Appellee,

versus

NATIONAL RAILROAD PASSENGER CORPORATION,

Defendant-Appellant.

Appeal from the United States District Court for the Middle District of Florida

(September 3, 2004)

Before BLACK and KRAVITCH, Circuit Judges, and STROM*, District Judge.

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* Honorable Lyle E. Strom, United States District Judge for the District of Nebraska, sitting by designation.

Appendix A

PER CURIAM:

This appeal arises out of the same facts as another case this court recently decided. *Moye O'Brien, O'Rourke, Hogan, & Pickert v. National R.R. Passenger Corp.*, __ F.3d __, 2004 WL 1566567 (11th Cir. Jul. 14, 2004) ("*Amtrak*"). In each case, the National Railroad Passenger Corporation ("Amtrak") appealed the district court's order requiring Amtrak to release certain documents pursuant to Moye, O'Brien, O'Rourke, Hogan & Pickert's ("Moye O'Brien") Freedom of Information Act ("FOIA") request.

The events leading up to the current appeal began in 1995 when Amtrak entered into a contract with Balfour Beatty Construction, Inc. and the Massachusetts Electric Company ("BBC-MEC") to design and build a high-speed rail system between New Haven, Connecticut, and Boston, Massachusetts. The project, referred to as the Northend Electrification Project, was financed with federal funds and was intended to construct a high speed rail system between Washington, D.C., and Boston, Massachusetts. The issue here stems from an ongoing dispute between Amtrak and BBC-MEC concerning the quality of anchor bolts used in the Northend Electrification Project. Arbitration proceedings between the parties are pending before a Dispute Resolution Board ("DRB").[1] Moye O'Brien made a FOIA request and,

1. The resolution of disputes between Amtrak and BBC-MEC by the DRB panel is mandated by the parties' contract. It is not clear what issues will be before the DRB, but, for purposes of this case, Amtrak claims that the deliberative process privilege applies to the documents in question because it is deciding whether to bring anchor-bolt claims in those proceedings.

after Amtrak denied the request, filed suit in district court seeking to compel disclosure of the requested documents. Amtrak claimed that the deliberative process privilege protects the documents requested by Moye O'Brien from disclosure. After a bench trial, the district court found that Amtrak failed to prove the applicability of the deliberative process privilege and granted Moye O'Brien's motion for judgment as a matter of law. Amtrak appeals.

The documents in question, according to Amtrak, include (1) "[e]xpert consultants' proposals . . . solicited by Amtrak's outside counsel . . . or directly by Amtrak itself, relating to potential anchor bolt claims and defenses;" (2) "[a]dvice memoranda and consultant compilations" including memoranda prepared by outside counsel; (3) Amtrak "[i]nternal memoranda" concerning anchor bolts; and (4) several tables from a Document Control Database, as well as an entire Litigation Database. In addition, Amtrak avers that the district court ordered disclosure of many documents that were unresponsive to the plaintiff's FOIA request.

The district court rejected Amtrak's deliberative process claim for these documents because "[t]here is no credible evidence that [outside counsel][2] made a recommendation to Moore, Serfaty and Alleman[3] regarding whether and how to

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2. Amtrak's primary outside counsel is the law firm of Manatt Phelps and Phillips ("Manatt Phelps").

3. Dennis M. Moore is Amtrak's Senior Associate General Counsel. Alicia Serfaty is Amtrak's General Counsel. Steven Alleman is the Northend Electrification Project contracting officer and project

(Cont'd)

bring claims and defenses in the DRB that address the adequacy of the anchor bolt steel," and that "[t]here is also no credible evidence that Moore, Serfaty and Alleman were engaged in a deliberative process about whether and how to bring such claims and defenses." In addition, the district court determined that "Amtrak did not satisfy its burden of proving that each of the withheld documents was part of the proffered deliberative process." Finally, the district court found "no credible evidence that Serfaty or Alleman actually reviewed any of the withheld documents as part of the deliberative process," and that "the evidence supports a conclusion that [Moore] received and reviewed the listed documents in connection with preparing the Index, rather than in his role as a decisionmaker regarding" anchor bolt claims.[4]

We review a district court's conclusions of law de novo and its findings of fact for clear error. *MiTek Holdings Inc. v. Arce Eng'g Co.*, 89 F.3d 1548, 1554 (11th Cir. 1996). The FOIA requires government agencies to disclose documents when requested by members of the public. 5 U.S.C. § 552(a). There are, however, several statutory exemptions to this disclosure requirement, but, because these exemptions are narrowly construed, *Florida House of Representatives v. United States Dep't of Commerce*, 961 F.2d 941, 944 (11th Cir. 1992), the government has the burden to prove that a

(Cont'd)

director. Moore, Serfaty, and Alleman are the ultimate decisionmakers regarding whether Amtrak will bring anchor bolt claims in the pending arbitration proceedings.

4. Additional facts and background material relating to this case can be found in our prior opinion. *Amtrak*, 2004 WL at * 1-*2.

requested document is exempted. FOIA Exemption 5, which includes the deliberative process privilege, protects from disclosure "inter-agency or intraagency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). This provision exempts documents that are privileged, and thus not discoverable, in the pretrial discovery context. *Florida House of Representatives*, 961 F.2d at 944.

In an effort to safeguard the quality of agency decisions, the deliberative process privilege protects the internal decision-making processes of the executive branch. *See id.* The Senate Report points out that "'frank discussion of legal or policy matters' in writing might be inhibited if the discussion were made public; and that the 'decisions' and 'policies formulated' would be the poorer as a result." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975) (quoting S. Rep. No. 89-813, at 9 (1965)). Thus, the privilege is intended to encourage open and frank communications between agency personnel.

To fall within the deliberative process privilege, the agency must show that the documents sought to be protected are "(1) predecisional, i.e., 'prepared in order to assist an agency decisionmaker in arriving at his decision,' and (2) deliberative, i.e., 'a direct part of the deliberative process in that it makes recommendations or expresses opinions on legal or policy matters.'" *Florida House of Representatives*, 961 F.2d at 945 (citations omitted). Generally, documents are deliberative if they reflect "opinion" or "policy-making" processes, as opposed to purely factual, investigative matters. *Id.* at 947; *see Sears, Roebuck & Co.*, 421 U.S. at 150 (noting

that the focus of the deliberative process privilege is "on documents 'reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated'"). Thus, if documents can be categorized as advice or opinion, they are deliberative.[5] Factual materials, in certain circumstances, may also be withheld. *Nadler v. United States Dep't of Justice*, 955 F.2d 1479, 1491 (11th Cir. 1992), *abrogated on other grounds by United States Dept of Justice v. Landano*, 508 U.S. 165 (1993). ("Factual material maybe withheld . . . when [it] is so inextricably connected to the deliberative material that its disclosure would reveal the agency's decision making processes, . . . or when it is impossible to segregate in a meaningful way portions of the factual information from the deliberative information.").

We hold that the district court erred by concluding that the documents sought by Moye O'Brien were not protected from disclosure by the deliberative process privilege. We agree with Amtrak that the key issue on appeal is a legal question-whether the district court correctly concluded that the documents are not exempt from disclosure because they were not considered by the final decisionmaker. In so holding, we conclude that the district court construed the scope of the privilege too narrowly. The district court's opinion frequently refers to the ultimate decisionmakers and does

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5. This fact/opinion distinction does not work in every case, but offers a predictable rule in most cases. *Fla. House of Rep.*, 961 F.2d at 948. The ultimate goal, however, is to determine whether the documents in question reflect "'the give-and-take of the consultative process.'" *Id.* (quoting *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854 (D.C.Cir.1980)).

not consider the role that other agency staff members play in the deliberative process.[6] As we recently noted, focusing exclusively on the ultimate decisionmakers "fails to account for the significant role . . . which the lower level staff play in Amtrak's deliberative process." *Amtrak*, 2004 WL at *8. Consequently, we reverse the district court's opinion and remand with instructions to reconsider Amtrak's claims in light of the principles expressed in this opinion as well as in our previous opinion. Specifically, the district court should not focus on the documents solely as they relate to the ultimate decisionmakers, but, rather, should view the documents as they relate to the entire deliberative process in which the agency is engaged.[7]

REVERSED and REMANDED.

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6. For example, the district court stated: (1) "There is no credible evidence that [outside counsel] made a recommendation to Moore, Serfaty and Alleman regarding whether and how to bring claims and defenses in the DRB that address the adequacy of the anchor bolt steel;" (2) "There is also no credible evidence that Moore, Serfaty and Alleman were engaged in a deliberative process about whether and how to bring such claims and defenses;" (3) the district court found "no credible evidence that Serfaty or Alleman actually reviewed any of the withheld documents as part of the deliberative process;" and (4) that "the evidence supports a conclusion that [Moore] received and reviewed the listed documents in connection with [a role other] than in his role as a decisionmaker regarding" anchor bolt claims. (D. Ct. Op. at 5-8.) (Emphasis added.)

7. In so holding, we note that Moye O'Brien argues that our previous case does not control this case because, here, unlike in the earlier case, the district court found that there was no deliberative

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Appendix A

(Cont'd)
process regarding anchor bolts. Assuming that the district court made such a conclusion, that decision was based on a narrow view of the deliberative process privilege and, thus, the district court did not consider whether other staff members were engaged in a deliberative process.

We also note that Amtrak claims that the district court ordered disclosure of nonresponsive documents. A court may only order disclosure of records "improperly withheld from the complainant." 5 U.S.C. § 552(a)(4)(B). Courts cannot order disclosure of other materials, *Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 150 (1980), and, by definition, nonresponsive materials have not been "improperly withheld." On remand, the district court may only order disclosure of responsive documents.

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED JULY 14, 2004

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 03-14264

MOYE, O'BRIEN, O'ROURKE, HOGAN, & PICKERT,

Plaintiff-Appellee,

v.

NATIONAL RAILROAD PASSENGER CORPORATION,

Defendant-Appellant.

July 14, 2004.

Appeal from the United States District Court
for the Middle District of Florida.

Before TJOFLAT and HILL, Circuit Judges, and MILLS*, District Judge.

RICHARD MILLS, District Judge:

We deal here with the scope of the Freedom of Information Act's Exception 5, commonly known as the "deliberative process privilege."

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* Honorable Richard Mills, United States District Judge for the Central District of Illinois, sitting by designation.

Specifically, we must determine whether the district court erred in concluding that the Freedom of Information Act requests made to the National Railroad Passenger Corporation by the law firm of Moye, O'Brien, O'Rourke, Hogan, & Pickert were not protected from disclosure pursuant to the "deliberative process privilege."

After a review of the record, we conclude that the material sought *is* protected from disclosure by the "deliberative process privilege" and that the district court erred in requiring the National Railroad Passenger Corporation to disclose this material.

Accordingly, we must reverse and remand.

I. BACKGROUND

In December 1995, the National Railroad Passenger Corporation ("Amtrak") entered into a $321,000,000.00 contract with Balfour Beatty Construction, Inc., and Massachusetts Electric Construction Company ("BBC-MEC") to design and build a high-speed rail electrification system between New Haven, Connecticut, and Boston, Massachusetts. This project was referred to as the "Northeast Corridor Electrification Project," was financed with federal funds, and was intended to construct a rail system which would enable Amtrak to operate high speed train service between Washington, D.C., and Boston. The contract set forth certain work standards and a series of payment terms.

In 1988, Congress established an Office of Inspector General ("OIG") within Amtrak. Congress established the

OIG within Amtrak under the Inspector General Act of 1978, 5 U.S.C.App. 3 § § 1-12, which created inspector generals throughout the federal government in order to combat fraud, waste, abuse, and mismanagement in federal programs and operations.

Pursuant to the terms of its statutory mandate, Amtrak's OIG conducted a series of financial and performance audits of BBC-MEC's activities since the inception of the Northeast Corridor Electrification Project. Some of these audits prompted further investigation of whether BBC-MEC committed civil and/or criminal fraud in seeking contract payments. Amtrak's OIG also conducted a series of more routine financial audits evaluating whether BBC-MEC's various claims for additional payments were proper.

On May 1, 2001, the law firm of Moye, O'Brien, O'Rourke, Hogan & Pickert ("the firm") sent Amtrak a Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, request which contained 21 separately numbered paragraphs and which asked Amtrak to produce documents associated with twelve routine financial audits which Amtrak's OIG had performed with regard to the BBC-MEC's Northeast Corridor Electrification Project contract. The firm's FOIA request sought a broad array of documents, including final audit reports and associated drafts, notes, internal memoranda, and other work papers.[1]

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1. More specifically, paragraphs 1-13 sought various "audits" of the Northeast Corridor Electrification Project; paragraph 14 sought "any and all draft audit reports" during the time BBC-MEC had been involved in the project; paragraph 15 sought "any and all notes" (Cont'd)

Appendix B

On July 20, 2001, Amtrak issued a blanket denial of the firm's FOIA request, asserting that all of the requested documents were exempted from disclosure pursuant to all three components of FOIA's Exemption 5 (*i.e.*, attorney work product, attorney-client privilege, and deliberative process privilege). 5 U.S.C. § 552(b)(5). On August 20, 2001, the firm filed an administrative appeal of Amtrak's decision.

However, Amtrak did not rule upon the merits of the firm's appeal. Instead, Amtrak, through a letter from its general counsel, informed the firm that Amtrak would be unable to address the merits of the administrative appeal because the documents in question were in the possession of Amtrak's OIG.

On February 2, 2002, the firm filed suit in federal district court. Specifically, the firm sued Amtrak, pursuant to 5 U.S.C. § 552(a)(4)(B) (*i.e.*, FOIA), to compel production of the requested documents. Amtrak answered the firm's Complaint by reasserting, *inter alia*, that the documents requested were exempted from disclosure by the deliberative process privilege codified in FOIA at 5 U.S.C. § 552(b)(5). On June 7, 2002, the parties consented to having the case heard by United States Magistrate Judge Karla R. Spaulding ("the district court"). The district court then held a series of scheduling conferences, ordered that responses to the firm's

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regarding those audits; paragraph 16 sought "any and all internal memos" regarding those audits; paragraphs 17-20 sought audit documents relating to a prior contractor on the project; and paragraph 21 sought documents relating to the issues of anchor bolts on the project.

FOIA requests be staged, and required Amtrak to respond to the firm's requests in groups: *i.e.*, requests 1-16, request 21, and requests 17-20, in turn.[2]

On November 8, 2002, the firm moved for partial summary judgment on requests 1-16 and on request 21. On January 15, 2003, Amtrak filed a cross-motion for summary judgment as to these requests. On May 13, 2003, the district court largely denied both parties' motions, essentially concluding that the evidentiary record had not been sufficiently developed in order to determine whether Amtrak had a valid basis for asserting the deliberative process privilege as to the requested documents.[3]

On July 28, 2003, the district court conducted a bench trial on the firm's FOIA requests 1-16. On August 18, 2003, the district court rejected Amtrak's assertion of the deliberative process privilege, allowed the firm's FOIA requests 1-16, and entered an order/injunction directing Amtrak to disclose most of the requested documents to the

2. The district court has held three bench trials on the firm's FOIA requests: one for FOIA requests 1-16 which has resulted in the instant appeal number 03-14264; FOIA request 21 which has resulted in appeal number 03-15535; and FOIA requests 17-20 which has resulted in appeal number 03-14823.

3. The district court did allow the firm's motion with respect to two categories of information which had been redacted from previously disclosed documents: the identity of certain individuals named in certain financial audit statements and third party business and financial information contained in two final audit reports. Amtrak has represented in its brief that it has now disclosed this material, and therefore, these documents are no longer at issue.

firm within twenty days. On September 5, 2003, the district court stayed its order/injunction requiring Amtrak to disclose the FOIA material requested by the firm in paragraphs 1-16 pending a resolution of Amtrak's appeal to this Court.

II. ISSUE

Whether the district court erred in finding that the firm's FOIA requests 1-16 to Amtrak were not protected by the deliberative process privilege and, thus, were not exempt from disclosure pursuant to 5 U.S.C. § 522(b)(5)?

III. STANDARD OF REVIEW

This Court reviews a district court's conclusions of law regarding the deliberative process privilege *de novo* and its findings of fact for clear error. *Office of the Capital Collateral Counsel, N. Region of Florida ex rel. Mordenti v. Department of Justice*, 331 F.3d 799, 802 (11th Cir. 2003); *MiTek Holdings, Inc. v. Arce Eng'g Co., Inc.*, 89 F.3d 1548, 1554 (11th Cir. 1996).

IV. ANALYSIS

A. *ARGUMENTS*

1. *Amtrak*

Amtrak argues that the district court erred in finding that the firm's FOIA requests 1-16 were not protected from disclosure pursuant to FOIA's Exemption 5 (*i.e.*, the deliberative process privilege), 5 U.S.C. § 552(b)(5), for four

reasons. *First*, Amtrak asserts that, contrary to the district court's conclusions, the protections afforded by the deliberative process privilege are not confined only to the documents reviewed by the final decision-maker. On the contrary, Amtrak contends that the deliberative process privilege extends, not only to the draft audit reports submitted for the final decision-maker's consideration, but to the internal memoranda, notes, and other work papers prepared by lower level auditors and their staff because these staff level work papers play a significant role in the deliberative process and are a vital part of the consultative process. Amtrak asserts that these documents essentially record the deliberative process and, therefore, are protected by the privilege.

Second, Amtrak claims that the public policy considerations underlying the privilege mandate that these documents be considered privileged. Amtrak argues that decision-making in large, hierarchical organizations frequently requires consultation and deliberation among staff and lower level officials in order to gather and analyze data, narrow the range of possible policy choices, compile and verify a factual record, and shape recommendations for a final decision. Amtrak asserts that subordinates' participation in this process requires the same protection of full and frank communications which is afforded to higher level officials; otherwise, Amtrak claims, the potential for disclosure would chill subordinates' communications and internal discussions.

Third, Amtrak argues that the district court improperly placed the burden upon it to establish that disclosure of the documents would chill communications from a particular

subordinate auditor to senior auditors and, ultimately, to the decision-maker. Amtrak asserts that Congress has already determined that disclosure of deliberative materials carries a risk of chilling internal discussions, and thus, the district court erred in requiring it to make a further showing of a chilling effect.

Fourth, Amtrak argues that its detailed evidentiary submissions to the district court at the bench trial clearly established that the audit work papers sought by the firm embodied precisely the type of advice, recommendations, and discretionary policy choices protected by the deliberative process privilege. In particular, Amtrak contends that the audit work papers record the auditors' decisions as to the methodology and scope of the planned audit, the mental impressions of interviews, documents, and other data, preliminary analyses and conclusions, supervisory review, and on-going evaluation of the audit work in progress. As such, Amtrak claims that the audit work papers document a collaborative, consultative process leading to a final audit decision and, therefore, fall squarely within the protection of the deliberative process privilege.

In short, Amtrak argues that the district court's narrow, restrictive interpretation of the deliberative process privilege is at odds with both precedent and sound public policy considerations. Amtrak contends that, contrary to the district court's finding, it carried its burden of establishing that the documents sought by the firm were both predecisional and deliberative. As such, Amtrak asks the Court to reverse the district court's order/injunction requiring them to disclose the documents sought by the firm in its FOIA requests 1-16.

Appendix B

2. *The Firm*

The firm asks the Court to affirm the district court's holding because the district court correctly found that Amtrak had failed to carry its evidentiary burden of proof at trial and because the district court did not commit any errors as a matter of law. Specifically, the firm asserts that the district court correctly found that Amtrak had failed to carry its evidentiary burden of proving that the audit work papers were predecisional and deliberative. The firm contends that the only deliberative process asserted by Amtrak was Gary Glowacki's (*i.e.*, the decision-maker) decision regarding whether or not to issue a final audit report. However, the district court found that Amtrak failed to offer any evidence regarding the deliberative process employed by Glowacki in determining whether or not to issue a final audit report on the BBC-MEC contract, and the firm asserts that this finding is not clearly erroneous.

Furthermore, the firm claims that the district court applied the proper legal standards in evaluating Amtrak's claim of the deliberative process privilege. In fact, the firm notes that the district court quoted verbatim the standard set forth by this Court in prior published opinions for determining whether the privilege applies.[4]

Moreover, the firm contends that Amtrak has mischaracterized the district court's holding in that, contrary to Amtrak's assertion, the district court did not limit the

4. The firm also argues that Amtrak has waived its argument that the district court applied the wrong legal standard by failing to raise the issue to the district court during the bench trial.

applicability of the deliberative process privilege to the deliberations of the decision-maker. On the contrary, the firm argues that the district court expressly recognized that the privilege could also reach a decision-maker's communications with subordinates, but the district court went on to hold that the privilege did not extend to these documents under the circumstances.

In addition, the firm argues that the district court's decision is consistent with public policy considerations relating to FOIA. Specifically, the firm contends that Congress enacted FOIA in order to permit access to information and that FOIA mandates disclosure of documents unless a specified exemption applies. The firm asserts that Amtrak's interpretation of Exemption 5 would swallow the rule and would shield almost every document within the Government's control from public scrutiny.

Finally, the firm argues that Glowacki's decision regarding whether or not to issue a final audit report is not a "decision" to which Exemption 5 applies. In short, the firm contends that the decision to issue or not to issue a final audit report does not qualify as a deliberative process affecting any agency law or policy, and thus, Amtrak cannot avail itself of the deliberative process privilege. Accordingly, the firm asks the Court to affirm the district court's order/injunction requiring Amtrak to disclose the material which it sought pursuant to its FOIA requests 1-16.

Appendix B

B. *DISCUSSION*

FOIA requires government agencies to disclose to the public any requested documents.[5] *United States v. Weber Aircraft Corp.*, 465 U.S. 792, 793-94, 104 S.Ct. 1488, 79 L.Ed.2d 814 (1984); 5 U.S.C. § 552(a), (b). An agency may avoid disclosure only if it proves that the documents fall within one of nine statutory exemptions. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 136, 95 S.Ct. 1504, 44 L.Ed.2d 29 (1975); *Office of the Capital Collateral Counsel*, 331 F.3d at 802. Because FOIA's purpose is to encourage disclosure, its exemptions are to be narrowly construed. *Cochran v. United States*, 770 F.2d 949, 954 (11th Cir. 1985) (citing *Department of Air Force v. Rose*, 425 U.S. 352, 366, 96 S.Ct. 1592, 48 L.Ed.2d 11 (1976)). The government bears the burden of proving that a requested document is exempted. *EPA v. Mink*, 410 U.S. 73, 80, 93 S.Ct. 827, 35 L.Ed.2d 119 (1973); *Chilivis v. SEC*, 673 F.2d 1205, 1210-11 (11th Cir. 1982); 5 U.S.C. § 552(a)(4)(B).

"Exemption 5 protects from disclosure 'inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.' " *Department of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8, 121 S.Ct. 1060, 149 L.Ed.2d 87 (2001) (quoting 5 U.S.C. § 552(b)(5)). This provision shields those documents, and only those documents, normally privileged in the civil discovery context. *Sears, Roebuck & Co.*, 421 U.S. at 149, 95 S.Ct. 1504. "Stated simply, '[a]gency documents which would not be obtainable

5. Although Amtrak is not a federal agency, it must comply with FOIA's requirements. 49 U.S.C. § 24301(e).

by a private litigant in an action against the agency under normal discovery rules (*e.g.*, attorney-client, workproduct, executive privilege) are protected from disclosure under Exemption 5.'" *Grand Cent. P'ship, Inc. v. Cuomo*, 166 F.3d 473, 481 (2d Cir. 1999) (quoting *Providence Journal Co. v. United States Dep't of the Army*, 981 F.2d 552, 557 (1st Cir. 1992)); *Enviro Tech Int'l, Inc. v. USEPA*, 371 F.3d 370, 374 (7th Cir. 2004) ("Conversely, if a private litigant could not obtain certain records from the agency in discovery, Exemption 5 relieves the agency of the obligation to produce that document to a member of the public.").

Exemption 5 also includes a "deliberative process privilege." *Nadler v. United States Dep't. of Justice*, 955 F.2d 1479, 1490 (11th Cir. 1992), *abrogated on other grounds by United States Dep't of Justice v. Landano*, 508 U.S. 165, 113 S.Ct. 2014, 124 L.Ed.2d 84 (1993). The purpose of this privilege is to allow agencies to freely explore possibilities, engage in internal debates, or play devil's advocate without fear of public scrutiny. *Klamath Water Users*, 532 U.S. at 8-9, 121 S.Ct. 1060.

In addition, the privilege "protect[s] against premature disclosure of proposed policies before they have been finally formulated or adopted and protect[s] against confusing the issues and misleading the public by dissemination of documents suggesting reasons and rationales for a course of action which were not in fact the ultimate reasons for the agency's action." *Id.* Thus, Exemption 5 covers documents reflecting advisory opinions, recommendations, and deliberations comprising part of a process by which governmental decisions and policies are formulated. *Sears, Roebuck & Co.*, 421 U.S. at 150, 95 S.Ct. 1504.

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To fall within the deliberative process privilege, a document must be both "predecisional" and "deliberative." *Klamath Water Users*, 532 U.S. at 8, 121 S.Ct. 1060. A "predecisional" document is one prepared in order to assist an agency decision-maker in arriving at his decision and may include recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency. *Florida House of Representatives v. United States Dep't of Commerce*, 961 F.2d 941, 945 (11th Cir. 1992); *State of Missouri ex rel. Shorr v. United States Army Corps of Eng'rs*, 147 F.3d 708, 710 (8th Cir. 1998). However, "the privilege does not protect a document which is merely peripheral to actual policy formation; the record must bear on the formulation or exercise of policy-oriented judgment. Material which predates a decision chronologically, but did not contribute to that decision, is not predecisional in any meaningful sense." *Grand Central P'ship*, 166 F.3d at 482 (quoting *Ethyl Corp. v. USEPA*, 25 F.3d 1241, 1248 (4th Cir. 1994) (internal quotation marks omitted)).

A document is "deliberative" if the disclosure of the materials would expose an agency's decision-making process in such a way as to discourage candid discussion within the agency and, thereby, undermine the agency's ability to perform its functions. *Shorr*, 147 F.3d at 710 (citing *Assembly of State of California v. United States Dep't of Commerce*, 968 F.2d 916, 920 (9th Cir. 1992)); *Dudman Communications Corp. v. Department of Air Force*, 815 F.2d 1565, 1568 (D.C. Cir. 1987) ("[T]he key question in Exemption 5 cases [is] whether the disclosure of materials would expose an agency's decisionmaking process in such a way as to

discourage candid discussion within the agency and thereby undermine the agency's ability to perform its functions."). The underlying purpose of the deliberative process privilege is to ensure that agencies are not forced to operate in a fish bowl. *Dow Jones & Co., Inc. v. Department of Justice*, 917 F.2d 571, 573 (D.C. Cir. 1990) (quotation omitted). Therefore, courts must focus on the effect of the material's release, *Schell v. United States Dep't of Health & Human Servs.*, 843 F.2d 933, 940 (6th Cir. 1988), and conclude that "[p]redecisional materials are privileged 'to the extent that they reveal the mental processes of decisionmakers.'" *Assembly of State of California*, 968 F.2d at 921 (quoting *National Wildlife Fed'n v. United States Forest Serv.*, 861 F.2d 1114, 1119 (9th Cir. 1988)).

Furthermore, the Supreme Court has adopted, for Exemption 5 purposes, a distinction between "factual" and "opinion" data. "Exemption 5 . . . requires different treatment for material reflecting deliberative or policy-making processes on the one hand, and purely factual, investigative matters on the other." *Mink*, 410 U.S. at 89, 93 S.Ct. 827. The Supreme Court issued this mandate despite its acknowledgment that the task of drawing a line between what is fact and what is opinion can at times be frustrating and perplexing. *Florida House of Representatives*, 961 F.2d at 947. While it was delineating the contours of the privilege in *Sears, Roebuck & Co.*, the Supreme Court implicitly reaffirmed this fact/opinion distinction by noting that the focus of the deliberative process privilege was "on documents reflecting advisory opinions, recommendations and deliberations. . . ." *Id.* at 150, 95 S.Ct. 1504.

Later, in *Federal Open Mkt. Comm. of Fed. Reserve Sys. v. Merrill*, 443 U.S. 340, 99 S.Ct. 2800, 61 L.Ed.2d 587 (1979), the Supreme Court explained that the purpose of the privilege for predecisional deliberations is to ensure that a decision-maker will receive the unimpeded advice of his associates. *Id.* at 359-60, 99 S.Ct. 2800. Accordingly, the Supreme Court has held that factual information generally must be disclosed and materials embodying officials' opinions are ordinarily exempt from disclosure. *Petroleum Info. Corp. v. United States Dep't of Interior*, 976 F.2d 1429, 1434 (D.C. Cir. 1992) (citing *Mink*, 410 U.S. at 87-91, 93 S.Ct. 827).

In the instant case, we find that the district court erred in concluding that the documents sought by the firm were not protected from disclosure pursuant to the deliberative process privilege. 5 U.S.C. § 552(b)(5). In reaching this conclusion, we agree with Amtrak's assessment that there is no real factual dispute involved in this appeal; rather, the key issue is a legal one: whether the district court correctly concluded that the audit work papers and internal memoranda sought by the firm are not protected by the deliberative process privilege because they were not considered by the final decision-maker. Because we believe that the district court took too narrow a view of Exemption 5, we must reverse and remand.[6]

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6. Our holding applies equally to the documents identified by the district court as "miscellaneous work papers." Although it is true that these documents were issued after a final audit report, the documents all pertain to decisions as to whether to conduct further audit work in light of the completed audit findings and, therefore, are protected by the deliberative process privilege for the reasons discussed *infra*.

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Based upon the factual findings made by the district court, we believe that the audit work papers and the internal memoranda at issue are both predecisional and deliberative because Amtrak's evidentiary submissions establish that the entire body of collaborative work performed by Amtrak's OIG auditors document and contain the comments and notes authored by all levels of auditors working on the BBC-MEC assignment. Congress established Amtrak's OIG to ensure, *inter alia*, that federal funds are used for its intended purpose and to deter fraud, waste, and abuse. *Inspector Gen. of USDA v. Glenn*, 122 F.3d 1007, 1009 (11th Cir. 1997). Accordingly, Amtrak's OIG is charged with the responsibility to "provide policy direction for, and to conduct, supervise, and coordinate audits and investigations," to recommend policies for promoting efficiency and economy, and to prevent and detect fraud and waste. 5 U.S.C.App. 3 § § 3, 4.

Furthermore, although the district court acknowledged that Amtrak's OIG issuance of a final audit reported involved certain predecisional judgments and internal consultations which are protected by the deliberative process privilege, the district court too narrowly construed the scope of the privilege. The linchpin of the district court's reasoning (and our basis for reversal) is found in paragraph fifteen of the district court's conclusions of law. Therein, the district court rejected Amtrak's assertion of privilege as to the audit work papers because "[t]here is no evidence that Glowacki reviewed any of the auditors' working papers after receiving the draft audit report from the Senior Director responsible for the audit. Therefore, I find that the information in the audit working papers was not directly involved in Glowacki's decision-making process." R/E 177.

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However, the district court's ruling fails to account for the significant role during the auditing process which the lower level staff play in Amtrak's OIG's deliberative process. Again, as Amtrak's evidence revealed and as the district court's own factual findings establish, the audit work papers document the entire body of collaborative work performed by the auditors and contain: (1) the initial work plan for the audit describing its purpose and objectives as well as the methodologies and sampling techniques which will be used to gather and analyze the audit data; (2) the staff auditors' notes and/or memoranda summarizing site visits, interviews, meetings, and/or telephone conversations which record the auditors' impressions of the information obtained and his view of the reliability of the information; (3) the auditors' preliminary calculations, findings, and conclusions as well as a description of any additional work the auditor believes is necessary in order to complete an evaluation; and (4) suggestions and critiques from the auditors' peers and superiors, including recommendations for further action.

Contrary, to the district court's finding and the firm's assertion, Amtrak need not cite to a specific policy decision in connection with which the audit work papers and internal memoranda were prepared in order for these documents to be protected from disclosure by the deliberative process privilege. As the Supreme Court has explained:

> Our emphasis on the need to protect pre-decisional documents does not mean that the existence of the privilege turns on the ability of an agency to identify a specific decision in connection with which a memorandum is prepared. Agencies are,

> and properly should be, engaged in a continuing process of examining their policies; this process will generate memoranda containing recommendations which do not ripen into agency decisions; and the lower courts should be wary of interfering with this process.

Sears, Roebuck & Co., 421 U.S. at 151-52 n. 18, 95 S.Ct. 1504; *Vaughn v. Rosen*, 523 F.2d 1136, 1146 (D.C. Cir. 1975) ("We are not saying that a 'final decision' is necessary for there to be a 'deliberative process' which is protected by Exemption 5. Rather, we cite the absence of any assured final decision as indicative of the amorphous nature of the mass of information the Government seeks to protect, *i.e.*, the failure of the affidavits relied on to come to grips with and define what it is out of this mass of documents that the Government considers the 'deliberative process' and thus entitled to protection."). Thus, the district court erred in focusing exclusively upon whether the final decision-maker viewed the requested material rather than viewing the entire auditing process as a whole. *Id.* at 150, 95 S.Ct. 1504 (holding that the deliberative process privilege protects "documents reflecting advisory opinions, recommendations, and deliberations *comprising part of a process* by which governmental policies are formulated.") (emphasis added). Had the district court done so, it would have determined that the audit work papers and internal memoranda were protected by the deliberative process privilege. *See Hamilton Sec. Group Inc. v. Department of Housing and Urban Dev.*, 106 F.Supp.2d 23, 29-32 (D.D.C. 2000) (holding that the Inspector General's draft audit materials are deliberative materials protected from disclosure by Exemption 5 of

FOIA); *see also Mead Data Cent., Inc. v. United States Dep't of Air Force*, 575 F.2d 932, 934-35 (D.C. Cir. 1978) (concluding that "cost comparisons, feasibility opinions, and the data relevant to how the personnel involved arrived at those comparisons and opinions are policy deliberative.").

Likewise, the district court's finding that Amtrak failed to carry its burden of proof with regard to establishing the applicability of the privilege is incorrect because the district court focused solely upon the audit work papers and internal memoranda as it related directly to the decision-maker, Glowacki, rather than viewing these documents as they related to the entire auditing process. When viewed accordingly, it is clear that Amtrak established that the material was both predecisional and deliberative in character.

For example, Amtrak submitted a detailed declaration from a senior Amtrak OIG auditor, Roy Wiegand, who detailed the nature of the audit process and the role which the audit work papers play in documenting the mental impressions, advice, opinions, and recommendations of the auditors and supervisors at lower levels of the decisional process. Wiegand's testimony was undisputed at the bench trial.[7] Thus, it is clear that this material was consultative and deliberative in nature. *City of Virginia Beach, Virginia v. United States Dep't of Commerce*, 995 F.2d 1247, 1253 (4th Cir. 1993) (deliberative documents broadly include "recommendations, draft documents, proposals, suggestions,

7. Contrary to the firm's assertion otherwise, the district court did not find Wiegand's testimony incredible. In fact, the district court cited Wiegand's uncontradicted declaration as a basis for its findings on the content and purpose of the audit work papers.

and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency.") (internal quotation omitted).

In addition, while it is certainly true that FOIA's purpose is to encourage disclosure, it is equally true that Amtrak's OIG serves a valid public purpose and that this purpose would be hampered if lower level auditors declined to engage in open and frank discussions with supervisors and decision-makers for fear that their comments would be subjected to public scrutiny. *Florida House of Representatives*, 961 F.2d at 949 ("It defies reason as well as Supreme Court precedent, to then go back and weigh the policies underlying the distinction to decide whether disclosure would in fact discourage frank discussion in some specific case."). Congress established Amtrak's OIG to ensure that federal funds were being appropriately spent, and the enabling statute charged Amtrak's OIG with the responsibility of establishing appropriate audit policies, recommending policies for promoting efficiency and deterring abuse, and referring suspected civil and criminal violations to the Attorney General. 5 U.S.C.App. 3 § § 3, 4. Amtrak's OIG cannot fulfill these duties and further these policies if the lower level staff auditors' communications with supervisors and decision-makers are chilled by the fear of having their comments made public.

Nor are we overly concerned that our ruling will necessarily result in Exemption 5 swallowing FOIA's disclosure requirements. On the contrary, in order for the deliberative process privilege to apply, the decision-making process must bear a reasonable nexus to the documents

sought. Here, we find that such a reasonable nexus exists, and therefore, the audit work papers and internal memoranda sought by the firm are protected from disclosure by Exemption 5.[8]

V. CONCLUSION

In sum, we find that the district court took too narrow a view of the deliberative process privilege when it restricted Exemption 5's scope to extend only to those documents which were actually reviewed by the decision-maker Glowacki. In determining whether the deliberative process privilege applied, the district court should have considered whether the documents reflected advisory opinions, recommendations, and deliberations comprising part of a process by which Amtrak's OIG auditing policies were formulated. We hold that, applying this standard, Amtrak has satisfied its burden of establishing that the material sought by the firm is both predecisional and deliberative and, thus, protected from disclosure by FOIA's Exemption 5.

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8. We are not persuaded by the firm's other arguments (1) that Amtrak has waived its argument that the district court applied the wrong standard, (2) that Glowacki's decision regarding whether or not to issue a final audit is not a decision to which Exemption 5 even applies, and (3) that the audit work papers contain certain factual information which is not protected by the deliberative process privilege. Our review of the record persuades us that Amtrak has not waived any arguments for purposes of this appeal. In addition, as discussed *supra*, Exemption 5 is applicable to the documents sought by the firm. Finally, contrary to the district court's conclusion, the selection and sifting of factual materials (as is the case here) may itself be the product of a government agency's deliberative process and, therefore, entitled to the privilege. *Lead Indus. Ass'n, Inc. v. OSHA*, 610 F.2d 70, 85 (2d Cir. 1979); *Montrose Chem. Corp. of California v. Train*, 491 F.2d 63, 68 (D.C. Cir. 1974).

Accordingly, we reverse the district court's holding that Amtrak's audit work papers and internal memoranda are not protected from disclosure pursuant to FOIA's Exemption 5 and remand this case to the district court for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

APPENDIX C — FINDINGS OF FACT AND CONCLUSIONS OF LAW OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA, ORLANDO DIVISION DATED OCTOBER 22, 2003

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

Case No. 6:02-cv-126-Orl-KRS

MOYE, O'BRIEN, O'ROURKE, HOGAN & PICKERT,

Plaintiffs,

-vs-

NATIONAL RAILROAD PASSENGER CORPORATION,

Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause came on for consideration after a bench trial on the response of the defendant, National Railroad Passenger Corporation ("Amtrak"), to Freedom of Information Act ("FOIA") request number 21 made by the plaintiff, Moye, O'Brien, O'Rourke, Hogan & Pickert ("Moye O'Brien"). In this FOIA request, Moye O'Brien sought all documents "relating to the issue of anchor bolts on the [Northeast Corridor Electrification] Project." (Doc. No. 1, ex. A). Amtrak withheld documents responsive to this request

pursuant to the deliberative process privilege within FOIA exemption 5, 5 U.S.C. § 552(b)(5), and the internal practices exemption, exemption 2, 5 U.S.C. § 552(b)(2).[1] Moye O'Brien challenges the application of these exemptions to the withheld documents. This matter is before me for disposition pursuant to the consent of the parties. (Doc. No. 34).

I held a bench trial on the exemptions claimed with respect to documents responsive to FOIA request number 21 on September 8 and 9, 2003. (Doc. Nos. 242-43) (hereinafter "TR."). At the trial, pursuant to the stipulation of the parties, Amtrak submitted the testimony of Dennis M. Moore through a sworn declaration. (Doc. No. 219 [hereinafter "Moore Decl."]). Amtrak provided the Court with an index of documents withheld under the deliberative process exemption and the internal practices exemption (Exhibits to Doc. No. 225 [hereinafter the "Index"]), and it introduced one exhibit. Upon stipulation of the parties, Amtrak also filed under seal for *in camera* review copies of the withheld documents, except that it did not provide a copy of the Litigation Database, Index No. 57.[2]

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1. Earlier in the case, Amtrak asserted that other exemptions applied to documents responsive to FOIA request number 21. Amtrak affirmatively withdrew some of these exemption claims. (Doc. No. 171). It abandoned its earlier assertion that the law enforcement exemption, exemption 7, 5 U.S.C. § 552(b)(7), and the attorney-client privilege and work product components of exemption 5 applied by failing to assert those exemptions and present evidence in support of them at the bench trial. (*Cf.* Doc. No. 240).

2. The documents listed in the Index differ from those listed in the Amended Declaration of Medaris Oliveri (Plaintiffs ex. 126 (Cont'd)

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Moye O'Brien cross-examined Moore, introduced documentary exhibits and used demonstrative exhibits, but it did not call any witnesses. I granted Moye O'Brien's motion for entry of judgment in its favor as a matter of law with respect to exemptions not listed in the Index. (TR. 376; Doc. No. 240). I reserved ruling on Moye O'Brien's motion for entry of judgment in its favor as a matter of law on the deliberative process and internal practices exemptions. (TR. 376). In reaching my decision as set forth herein, I rely only on the evidence and index submitted at the bench trial and the documents filed in camera.

The Deliberative Process.

In December 1995, Amtrak entered into a $321 million lump sum contract with Balfour Beatty Construction, Inc. and Mass Electric Construction Company, a joint venture generally referred to as BBC-MEC, in connection with the design and construction of a high-speed rail electrification system between New Haven, Connecticut and Boston, Massachusetts. (Moore Decl. ¶¶ 7-8) (hereinafter the

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(Cont'd)

[hereinafter "Amended Oliveri Decl."]), which was submitted in connection with summary judgment motions and responses in this case. Moore testified that the Amended Oliveri Declaration listed the documents as they were found in Amtrak's files. For purposes of the Index, Amtrak "disaggregated" the documents, renumbered them, and assembled them in chronological order. (Moore Decl. ¶¶ 18-19; TR. 208). I note that nothing in my order regarding the creation of an index for purpose of this litigation required, or contemplated, that Amtrak would present the withheld documents in any form other than the way they were kept in Amtrak's files.

"Contract"). Pursuant to the terms of the Contract, BBC-MEC made claims against Amtrak. Amtrak asserted various defenses to these claims. Litigation of these disputed claims is taking place before a three-member arbitration panel established under the Contract, which is known as the Dispute Resolution Board ("DRB"). (Moore Decl. ¶ 8). DRB hearings are conducted nearly every month. (Moore Decl. ¶ 25). Moore, a Senior Associate General Counsel working within the Litigation Division of Amtrak's Law Department, is overseeing the work of outside counsel Amtrak hired to litigate the Contract claims and advise it on Contract issues. These outside counsel include the law firms of Manatt, Phelps and Phillips ("Manatt Phelps"), and Wickwire, Gavin. (Moore Decl. ¶ 29; TR. 70-71, 224-25).

Moore testified that the deliberative process applicable to the withheld documents is the decision whether and how to bring claims and defenses in the DRB proceedings arising from the adequacy of the steel used in the anchor bolts on the Project, which decision has not yet been made. The decision whether and how to bring these claims and defenses will be made collectively by Moore, Alicia Serfaty, Amtrak's General Counsel, and Steven Alleman, the Project Manager.[3] (Moore Decl. ¶¶ 31-33; TR. 221-22). Moore averred that this process began in the spring or summer of 2000, when Amtrak's interest in the anchor bolts used in the Project was renewed by virtue of the United States taking an interest in the issue. (T.R. 211; *cf.* Moore Decl. ¶ 34 [Decisions whether

3. Previously, Richard Sarles would also have been one of the decisionmakers, but his duties in that respect have been assumed by Alleman. (TR. 148).

to proceed against BBC-MEC for violations of federal statutes will be made by the United States Department of Justice and the Office in the Inspector General.]). Serfaty became a decisionmaker when she assumed her role as Amtrak General Counsel sometime after October 2001. (TR. 21-22; Plaintiff's ex. 107). Moore did not become involved in the litigation until May or June 2000. (TR. 212). Alleman became the Project Manager by at least 2000. (TR. 221).

Deliberative Process Exemption.

The deliberative process exemption protects the process through which agency decisionmakers make decisions or develop policies. *See, e.g., NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975). To justify withholding a document under this exemption, Amtrak must prove the following: "the document is (1) predecisional, i.e., 'prepared in order to assist an agency decisionmaker in arriving at his decision,' . . . and (2) deliberative, i.e., 'a direct part of the deliberative process in that it makes recommendations or expresses opinions on legal or policy matters.'" *Fla. House of Representatives v. U.S. Dept of Commerce*, 961 F.2d 941, 945 (11th Cir. 1992) (internal citations omitted).

I find from review of the evidence and *in camera* review of the withheld documents that Amtrak did not sustain its burden of proving that Moore, Serfaty and Alleman were engaged in the stated deliberative process. Rather, in 2001, when the FOIA request was received and processed,[4] lawyers

4. Amtrak did not search for documents created after the FOIA request was served. (TR. 305).

at Manatt Phelps were still developing information to assess and recommend to Amtrak whether and how to assert claims and defenses in the DRB proceedings. Among other things, the Manatt Phelps lawyers were reviewing existing documents and consulting with Amtrak engineers and other experts about the adequacy of the anchor bolt steel. There is no credible evidence that Manatt Phelps made a recommendation to Moore, Serfaty and Alleman regarding whether and how to bring claims and defenses in the DRB proceedings that address the adequacy of the anchor bolt steel.

There is also no credible evidence that Moore, Serfaty and Alleman were engaged in a deliberative process about whether and how to bring such claims and defenses. The evidence established that Moore, Serfaty and Alleman were not active participants in Manatt Phelps' development of the anchor bolt issues. Moore, Serfaty and Alleman, and their predecessors, were not direct recipients of many of the documents listed in the Index (TR. 135-42, 146, 160-70,174-81, 186-87), and there is no credible evidence that they reviewed documents they received directly or indirectly[5] in their roles as decisionmakers. Indeed, Alleman

5. The Index includes an asterisk after the name of individuals who purportedly received the listed documents even though they were not listed as recipients on the face of the documents. (Moore Decl. ¶ 21). The use of the asterisk indicates that Moore and unnamed others at Amtrak pooled their knowledge about the likely distribution of each document. (TR. 222-23). Moore has not verified that Serfaty, Alleman or their predecessors actually received or reviewed documents that they purportedly received as indirect recipients, except to the extent that he discussed some of the listed documents with Alleman. (*See* TR. 45, 73).

confirmed in testimony before the DRB in March 2003 that he had not been involved in, and was unaware of, decisions that had been made about the testing of the anchor bolts. (Plaintiffs ex. 116; *see also* TR. 284, 288). Even Moore, the senior litigation attorney assigned to the DRB litigation, was not directly copied on most of the withheld documents, and he was not included in various meetings between and among Amtrak's consultants. (*See* TR. 79, 159, 164, 167, 170). Moore conceded that he may not have received some of the listed documents before the FOIA request was received by Amtrak. (TR. 83, 216).

Further, Amtrak did not satisfy its burden of proving that each of the withheld documents was part of the proffered deliberative process. The deliberative process exemption does not encompass all of the documents created by an agency preliminarily to an agency decisionmaker making his or her decision. *See Vaughn v. Rosen*, 523 F.2d 1136, 1145 (D.C. Cir. 1975). For a document to be part of the deliberative process, at a minimum a decisionmaker must have received the document before the time a decision is made. *See Schell v. U.S. Dept of Health and Human Servs.*, 843 F.2d 933, 940 (6th Cir.1988) (quoting *Sears, Roebuck & Co.*, 421 U.S. at 151). The document must also have been a direct part of the decisionmaker's deliberative process, not merely peripheral information. *See, e.g., Providence Journal Co. v. U.S. Dep't of Justice*, 981 F.2d 552, 560 (1st Cir. 1992).

Moore averred that the deliberative process on which Amtrak relies began in the spring or summer of 2000. (TR. 211). Documents created before that time necessarily were not created for the purpose of assisting in a decision

that was not yet at issue. Similarly, the Document Control Database was created originally by Project staff for business use by the Project office, not for use by decisionmakers in the DRB proceedings. (Amended Oliveri Decl. ¶ 10; Index Nos. 53-56).

Documents created for a general purpose, such as business cards, resumes and curriculum vitae, also are not protected by the deliberative process exemption. Amtrak has not presented evidence that withheld documents of this type were created for the purpose of assisting the decisionmakers at Amtrak. (*See, e.g.*, Index Nos. 21, 22).

Further, because the deliberative process exemption does not protect segregable facts, documents created before the deliberative process purportedly began cannot be protected simply because they were later compiled for review. For instance, the Litigation Database consists entirely of images of documents. (*See* Index No. 57). Amtrak has not proven that any of these imaged documents, or other documents compiled by Amtrak's lawyers (*see, e.g.*, Index Nos. 33, 34, 35), were created for the purpose of assisting the decisionmakers.

Finally, there is no credible evidence that Serfaty or Alleman actually reviewed any of the withheld documents as part of the deliberative process of deciding whether and how to bring claims and defenses in the DRB proceedings regarding the adequacy of the anchor bolt steel.[6]

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6. Moore testified that he discussed several of the listed documents with Alleman. (TR. 45). Because Moore did not describe

(Cont'd)

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As for Moore's review of the documents, the evidence supports the conclusion that he received and reviewed the listed documents in connection with preparing the Index, rather than in his role as a decisionmaker regarding claims and defenses to be asserted in the DRB proceedings. For example, review *in camera* of the document described in Index No. 4 reveals that Moore did not obtain the complete copy of this document until August 8, 2003, when he received a portion of it from a lawyer at Manatt Phelps in connection with preparation of the Index for this litigation.[7] Similarly, the document described in Index No. 27 contains pages (Bates Nos. 389-681) that were not part of the document as originally described in paragraph 39 of the Amended Oliveri Declaration, supporting the conclusion that Moore did not obtain the additional pages until he began reviewing the documents to prepare the Index.

Accordingly, I conclude that none of the listed documents are protected by the deliberative process privilege within exemption 5.[8]

(Cont'd)
the circumstances under which these discussions occurred, his testimony does not establish that these discussions were part of the deliberative process to decide whether and how to bring additional anchor bolt claims and defenses against BBC-MEC.

7. The Index did not disclose that the fax cover sheet included within the document is dated August 8, 2003.

8. Based on this finding, I need not consider Moye O'Brien's argument that Amtrak waived the deliberative process exemption by failing to assert it as to all of the withheld documents in the Amended Oliveri Declaration.

Appendix C

Internal Practices Exemption.

The internal practices exemption protects matters that are "related solely to the internal personnel rules and practices of an agency." 5 U.S.C. § 552(b)(2). In order to fall within the privilege, the withheld documents must have been used for predominantly internal purposes within the agency. *See Crooker v. Bureau of Alcohol, Tobacco and Firearms*, 670 F.2d 1051, 1073 (D.C. Cir. 1981); *see also Jordan v. U.S. Dep't of Justice*, 591 F.2d 753, 763 (D.C. Cir. 1978) (en banc) (observing that personnel matters "would normally connote matters relating to pay, pensions, vacations, hours of work, lunch hours, parking, etc . . . ."). "[T]he general thrust of the exemption is simply to relieve agencies of the burden of assembling and maintaining for public inspection matter in which the public could not reasonably be expected to have an interest." *Dep't of the Air Force v. Rose*, 425 U.S. 352, 369-70 (1976).

One court has divided documents protected by exemption 2 into two categories.

> The first category covers trivial administrative data, or so-called "Low 2 exemptions," which include file numbers, mail routing stamps, data processing notations and other administrative markings . . . . The second category, "high 2," consists of predominately internal documents the disclosure of which would likely circumvent agency regulations and statutes.

Schreker v. U.S. Dep't of Justice, 74 F. Supp. 2d 26, 31 (D.D.C. 1999), *aff'd in pertinent part and rev'd in other*

respects, 254 F.3d 162 (D.C. Cir. 2001). Amtrak asserts only "low 2 exemptions," contending that portions of the withheld documents are protected by the internal practices exemption because the information is so trivial that it would not be of public interest.

Amtrak contends that fax transmittal documents, cover sheets and other documents showing distribution of materials fall within exemption 2. (Index Nos. 4, 6, 7, 9, 10, 11, 14, 15, 20, 21, 26, 27, 32, 34, 35, 37, 38, 39, 44, 49, 50, 52). Amtrak has not presented evidence that these documents are predominantly internal, and some appear to be documents external to the agency. (*See, e.g.*, Index Nos. 27, 35 [transmittal documents]). Even if some of the documents meet the "predominantly internal" test, the documents reveal by name, telephone number or other identifying information who sent or received the material and the date of the transmittal or distribution. The identity of individuals inside and outside an agency who reviewed materials, and the date they received the materials, may be of public interest. Moreover, some of the transmittal documents contain substantive, rather than trivial, information. (*See, e.g.*, Index Nos. 20, 21, 26, 35). Therefore, I find that Amtrak has not established that these documents are within exemption 2.

The document at Index No. 51 is an invoice from an outside consultant to Manatt Phelps. It cannot be construed to be a document created for predominantly internal use by the agency or otherwise related to the agency's personnel rules and practices. Therefore, I find that Amtrak has not established that this document is within exemption 2.

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Finally, Amtrak asserts that exemption 2 applies to database fields within the Document Control Database and the Litigation Database. (Index Nos. 53-57). Amtrak states at Index No. 53 that some of the fields it wishes to withhold were created "to record the predecisional deliberations about the distribution of project documents to Amtrak decision makers . . . ." As with transmittal documents, the identity of individuals inside and outside of government agencies who received materials and when they received them can often be of public interest. To the extent that some of the database fields may be internal tracking and cross-reference numbers, this information may, nonetheless, be of public interest if it enables an interested person to track the flow of information within and outside the agency. Further, the purpose of exemption 2 is not fulfilled by permitting the redaction of these fields because doing so would not relieve Amtrak of the burden of assembling these documents. Therefore, I conclude that Amtrak failed to sustain its burden of proving that any of the database fields fall within exemption 2.

Accordingly, I conclude that none of the listed documents are protected by the internal practices exemption.

Order.

It is ORDERED that Moye O'Brien's oral motion for judgment in its favor as a matter of law is GRANTED. It is further ORDERED that Amtrak is enjoined from withholding and is ordered to disclose within twenty days from the date of this order all documents listed in the Index.

Appendix C

At the close of all of the litigation in this matter, I will direct the Clerk of Court to issue a final judgment.

DONE and **ORDERED** in Orlando, Florida this 22d day of October, 2003.

s/ Karla R. Spaulding
KARLA R. SPAULDING
UNITED STATES MAGISTRATE JUDGE

APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA, ORLANDO DIVISION DATED AUGUST 18, 2003

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

Case No. 6:02-cv-126-Orl-KRS

MOPE, O'BRIEN, O'ROURKE, HOGAN & PICKERT,

Plaintiffs,

-vs-

NATIONAL RAILROAD PASSENGER CORPORATION,

Defendant.

ORDER

This cause came on for consideration after a bench trial on the response of the defendant, National Railroad Passenger Corporation ("Amtrak"), to Freedom of Information Act ("FOIA") requests numbers 1 through 16 made by the plaintiff, Moye, O'Brien, O'Rourke, Hogan & Pickert ("Moye O'Brien"). In these FOIA requests, Moye O'Brien sought all documents relating to certain audits conducted by Amtrak. (Doc. No. 1, ex. A). Amtrak withheld documents responsive to these requests pursuant to the deliberative

process privilege within FOIA exemption 5, 5 U.S.C. § 552(b)(5). Moye O'Brien challenges the application of this privilege to the withheld documents. It does not contend, however, that Amtrak's search for documents responsive to these FOIA requests was insufficient. This matter is before me for disposition pursuant to the consent of the parties. (Doc. No. 34).

I held a bench trial on the issues regarding FOIA requests numbers 1 through 16 on July 28, 2003. (Doc. No. 210) (hereinafter "TR."). At the trial, pursuant to the stipulation of the parties, Amtrak submitted the testimony of Roy Wiegand (Doc. No. 186), Beverly Walker (Doc. No. 188), and Kathleen Ranowsky (Doc. No. 187) through sworn declarations. Amtrak provided the Court with indices of the withheld documents (Exhibits to Doc. No. 202), but it did not introduce any documentary evidence. Moye O'Brien cross-examined Weigand, introduced documentary exhibits and one demonstrative exhibit, but it did not call any witnesses. I reserved ruling on Moye O'Brien's motion for entry of judgment in its favor as a matter of law. (TR. 72). In reaching my decision as set forth in this Order, I rely only on the evidence and indices submitted at the bench trial.

I. FINDINGS OF FACT.

The Contract.

1. In December 1995, Amtrak entered into a $321 million lump sum contract with Balfour Beatty Construction, Inc. and Mass Electric Construction Company, a joint venture generally referred to as BBC-MEC, to design and build a

high-speed rail electrification system between New Haven, Connecticut and Boston, Massachusetts. (Weigand Decl. ¶ 29; TR. 27 & Exhibit 2) (hereinafter referred to as the "Contract").

2. Pursuant to the Contract, certain work was established to be "allowance items." These allowance items were subject to adjustment in the event that the costs of these items exceeded the specific amounts included in the Contract. The Contract also permitted BBC-MEC to make requests for equitable adjustments, referred to as REAs, for costs not anticipated in the Contract caused by factors beyond BBC-MEC's control. (Weigand Decl. ¶ 30).

3. Individuals in Amtrak program management had responsibility for administering the Contract. (TR. 19).

Amtrak OIG Audit

4. Amtrak's Office of the Inspector General ("OIG") has an audit department, which I will refer to as OIG-Audits. OIG-Audits conducted audits of BBC-MEC's requests for allowance items or equitable adjustments. It also conducted audits of the proposal and termination costs claimed by Hayward Baker, another contractor working on the high-speed rail north end electrification project. (Weigand Decl. ¶¶ 1, 31, 32).

5. The audits that are the subject of the FOIA requests at issue with respect to which documents have been withheld are as follows (TR. 14):

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(a) *MOU II Acceleration Payment.* BBC-MEC requested payment of an additional sum to complete work by a specified deadline pursuant to a Memorandum of Understanding between Amtrak and BBC-MEC. This audit was to assess the accuracy of the requested accelerated payment. (Weigand Decl. ¶ 35)[1]. Gary Glowacki, Deputy Inspector General -- Audits, issued a final audit report on June 29, 2000. (Weigand Decl. ¶ 10; TR. 41 & Ex. 49). The index of withheld documents related to this audit indicates that a follow-up audit was conducted. No evidence was presented of such a follow-up audit. There is no evidence that the preparer of the index had personal knowledge of the audit process. *See* Findings of Fact ¶¶ 16, 18 infra. Therefore, I find that the evidence established that this audit concluded with the issuance of the final audit report on June 29, 2000.

(b) *Harmonic Filters Allowance Item.* This audit was to assess the accuracy and acceptability of the costs BBC-MEC incurred in excess of the amount allowed under the Contract. (Weigand Decl. ¶ 35). The auditors discussed the results of the audit with the contractor's representatives on February 22, 2000. The contractor provided a written response to the draft audit report. (Weigand Decl. ¶ 45 (citing Harmonic Filters Allowance Item Index, Bates Nos. 202257-258); TR. 46 & Ex. 45 at 000020). Glowacki issued a final audit report on April 6, 2000. (Ex. 45 at 000022).

(c) *REA 311 Steel and Concrete Revisions to Precast Foundations.* This audit was performed at the request of Amtrak's program management to review the material costs

1. I accept Weigand's description of each audit for background purposes.

and applicable mark-ups submitted by BBC-MEC for changes made to precast foundations as reflected in REA 311. (Weigand Decl. ¶ 35). Glowacki issued a final audit report on January 11, 1999. (REA 311 Index at 1).

(d) *Moveable Bridges Allowance Item.* This audit was performed at the request of the Project Director when BBC-MEC's billings exceeded the Contract amount allowed for the Moveable Bridges Allowance item. (Weigand Decl. ¶ 35). The auditors discussed the results of the audit with the contractor's representatives on August 2, 1999. (Moveable Bridges Allowance Item Index, Bates Nos. 203718-720). Glowacki issued a final audit report on August 18, 1999. (*Id.* at 1).

(e) *Hard Baker Proposal Costs.* This audit was performed at the request of Amtrak program management for a preaward evaluation of a proposal from Hayward Baker to serve as a supplemental foundation contractor. (Weigand Decl. ¶ 35). The auditors discussed the results of the audit with the contractor's representatives on January 8 and 9, 1998. (Hayward Baker Proposal Costs Index, Bates Nos. 204572-584). Glowacki issued a final audit report on January 30, 1998. (*Id.* at 1).

(f) *Harvard Baker Termination Costs.* This audit was to determine the accuracy and acceptability of amounts paid by Amtrak to Hayward Baker for mobilization and early termination of its contract to install minipile foundations on the project. (Weigand Decl. ¶ 35). The auditors discussed the results of the audit with the contractor's representatives on or before August 11, 1998. (Hayward Baker Termination

Costs Index, Bates No. 204796). Glowacki issued a final audit report on August 19, 1998. (*Id.* at 1).

(g) *REA 263 Structural Analysis for Catenary Bridge Attachments*. This audit was conducted in response to a request by BBC-MEC for an equitable adjustment for the costs of consultants hired to perform a structural analysis required by the States of Rhode Island and Massachusetts. (Weigand Decl. ¶ 35). Glowacki issued a final audit report on August 18, 1999. (REA 263 Index at 1).

(h) *REA 274 Suspension of Submarine Cable Installation*. This audit was conducted at the request of Amtrak's program management to review the labor and equipment costs and applicable mark-ups sought by BBC-MEC in connection with a work stoppage. (Weigand Decl. ¶ 35). Glowacki issued a final audit report on January 11, 1999. (REA 274 Index).

(i) *REA 120*. This audit was conducted to determine the acceptability of costs sought by BBC-MEC in a request for equitable adjustment related to claimed constructive acceleration of the project schedule. The audit was only partially completed, and no final audit report was issued. (Weigand Decl. ¶ 35).

(j) *Article 52 REA, Blocks 9 and 10*. This was an audit of the accuracy and acceptability of data submitted by BBC-MEC to support its request for an equitable adjustment relating to an installation design. The audit was only partially completed, and no final audit report was issued. (Weigand Decl. ¶ 35).

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(k) *REA 52.3*. This was an audit of the accuracy and acceptability of costs claimed by BBC-MEC in connection with its request for an equitable adjustment regarding certain foundations required by the Contract. The audit was only partially completed, and no final audit report was issued. (Weigand Decl. ¶ 35).

(l) *Sales and Use Tax*. This audit was to determine whether Amtrak had paid sales and use taxes as part of the costs passed through to Amtrak by BBC-MEC. (Weigand Decl. ¶ 35). Glowacki issued a final audit report on November 21, 2000. JR. 49 & Ex. 48 at 00060).

(m) *Equipment Charges*. This audit was to determine whether equipment costs billed under the Moveable Bridges Allowance Item were in compliance with the terms and conditions of the Contract and whether Amtrak program management had appropriate controls in place. (Weigand Decl. ¶ 35). On March 16, 2000, Weigand sent a letter to the project director for BBC-MEC stating the objective and scope of the audit. (TR. 33-34 & Ex. 16). Glowacki issued a final audit report on March 15, 2001. (TR. 36 & Ex. 47 at 000051).

6. Roy Weigand began work as an Amtrak Audit Manager on September 13, 1999. He was promoted to Senior Director for Audits, Boston Office, in November 2002. (Weigand Decl. ¶¶ 1, 3).

7. Weigand described the OIG-Audit process during the time he worked for Amtrak as follows:

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(a) Gary Glowacki, Deputy Inspector General -- Audits, approves the commencement of an audit. (Weigand Decl. ¶¶ 10-11).

(b) Thereafter, a Senior Director in the appropriate field office issues an assignment memorandum to the auditor who will be in charge of the audit and to other assigned auditors. The assignment memorandum sets forth the reason for the audit, the audit objectives, and any special circumstances affecting the audit. It often also contains special instructions to the auditors. (Weigand Decl. ¶ 12).

(c) An auditor notifies Amtrak program management that an audit process has begun. In some instances, the contractor who is the subject of the audit maybe notified that the audit is being conducted pursuant to an audit clause in a contract. (Weigand Decl. ¶ 13).

(d) The Auditor-In-Charge and other assigned auditors work together to complete the audit pursuant to the Government Audit Standards and Amtrak OIG's Audit Procedures Manual. (Weigand Decl. ¶¶ 6, 12).

(e) The auditors decide, based on their experience and judgment, what facts they need to reach a conclusion on a specific audit task. An analysis might include, for instance, a sampling of costs. (Weigand Decl. ¶ 34).

(f) Throughout the audit, the Auditor-In-Charge periodically reviews the work of other assigned auditors. (Weigand Decl. ¶ 19).

(g) When the audit work is sufficiently complete, the auditors work with the Auditor-In-Charge to prepare a draft audit report. (TR. 31). The draft audit report sets forth the preliminary calculations, findings and conclusions reached by the audit team. The draft audit report is reviewed by the Auditor-In-Charge. The Senior Director also reviews the draft audit report along with the underlying working papers. During this process, the draft audit report may be revised many times. (Weigand Decl. ¶ 21; TR. 52-53). The "senior" auditors are generally more experienced than other auditors on the team, but a "senior" auditor is not necessarily a supervisor of other auditors. (Weigand Decl. ¶ 19).

(h) When the Auditor-In-Charge and Senior Director are satisfied with the draft audit report, another auditor who was not involved in the audit is assigned to do an independent review and to cross reference the draft report with the working papers to check for factual accuracy and compliance with audit standards. This independent auditor may recommend revisions to the draft audit report. (Weigand Decl. ¶ 22).

(i) At some point before the final audit report is issued, Amtrak auditors may meet with the Amtrak program manager and the contractor in separate exit conferences. During the exit conference, the auditors provide the program manager and the contractor with the proposed results of the audit. (Weigand Decl. ¶ 45). They review each part of the draft audit findings with the contractor (*id.*), and provide the contractor with the exhibit to the draft audit report that shows the results of the audit (*see* Ex. 45 at 000020 & ex. B) (The cover memorandum reflects that the contractor's

response to the "draft report" is found at ex. B. In exhibit B, the contractor quotes from the audit-result exhibit to the draft audit report); see also TR. 21-22) (exhibit to draft audit report discussed at exit conference with Amtrak program management)). An auditor takes notes of the exit conference, including the program manager's and contractor's comments and responses to the proposed audit results. Sometimes the program manager's or contractor's comments may be included in the final audit report. (Weigand Decl. ¶ 45).

(j) After the independent review is completed, the draft audit report is sent to Glowacki for review and a decision whether or not to issue a final audit report. (Weigand Decl 11 21, 22). Glowacki may return the audit to the auditors for further work, refer the matter to OIG investigators if indications of potential fraud are found, or decline to issue a final audit report. (Weigand Decl. ¶¶ 25, 27).

(k) If Glowacki decides to issue a final audit report, he signs the draft audit report and sends it to the Senior Director responsible for the audit and the Amtrak program manager who has responsibility for the project that is the subject of the audit. (Weigand Decl. ¶ 28).

(l) The final audit report does not direct that any action be taken, but it may make recommendations to Amtrak program management. (TR.18). The program manager has thirty days to respond to the audit report. If the program manager does not agree with the conclusions in the report, he or she must report the disagreements to Glowacki. (Weigand Decl. ¶ 28). If the disagreements are not resolved, the Inspector General for Amtrak may decide whether to report the matter to Amtrak's President. (TR. 20).

(m) Amtrak maintains an audit tracking system. If Glowacki issues a final audit report, the Senior Director responsible for the audit codes the report as "issued" in the tracking system. (Weigand Decl. ¶ 28).

(n) In addition, significant audit findings are reported to Congress on a semi-annual basis. (Weigand Decl. ¶ 28).

8. Audits may be initiated by Amtrak but not completed for a variety of reasons, including that the need for the audit became moot or that other priorities required the auditors' attention. (TR. 32).

9. While he worked at Amtrak, Weigand was personally involved in four BBCMEC audits: MOU II Acceleration Payment; Harmonic Filters Allowance Item; Sales and Use Tax; and Equipment Charges. (Weigand Decl. ¶ 5). He also reviewed the audit reports and working papers on file for the other audits of BBC-MEC's requests for allowances or equitable adjustments. (TR. 60-61). Weigand reviewed the available documents for the Hayward Baker audits at a later time. (TR. 61). From his review of the previous audits, Weigand did not detect that any procedure which differed from the general audit procedure described above was followed. (TR. 61-62).

Audit Working Papers.

10. Applicable auditing standards require that Amtrak OIG-Audits document everything. The auditors do this in their working papers. (Weigand Decl. ¶ 14; TR. 57). The

papers include factual documents, such as copies of documents received from the contractor, contract excerpts, invoices and payroll records. They may also include data derived from factual documents and interviews. (Weigand Decl. ¶ 15). The working papers also include notes and comments by all levels of auditors working on the audit. They may contain information about the methodologies used to analyze data and answer audit objectives, such as sampling methodologies. (Weigand Decl. ¶ 14). They also include a variety of internal memos and checklists. (Weigand Decl. ¶ 17).

11. Working papers can be generally categorized into one of three areas: scope and method of the audit; investigation and analysis; and internal quality control. (TR. 29). The working papers in this case include the following types of documents:

(a) *Assignment Notification Memos*. A memorandum, usually prepared by a Senior Director, establishing the objectives, special circumstances and reasons for the audit. It also assigns auditors to the audit, and it may contain special instructions to the auditors. (Weigand Decl. ¶ 37).

(b) *Audit Program/Audit Work Plan*. This document includes the objectives, special circumstances, and methodology to be used in the audit. It discloses the information the auditors possess and what they must obtain. It assigns specific tasks to individual auditors and sets an estimate of the time needed to perform each task. (Weigand Decl. ¶¶ 38, 39).

(c) *Auditor Analysis Working Papers*. These documents typically include the specific cost elements analyzed, the source of information used by the auditor, and the auditor's analysis, preliminary calculations, findings and conclusions. They may also include the auditor's recommendation or opinion regarding additional audit work needed. Copies of supporting documents may be attached to the documents. (Weigand Decl. ¶ 40).

(d) *Internal Memos of Interviews and Phone Calls*. These documents reflect an auditor's notes of interviews and telephone calls used to gather information for the audit. The notes may include the auditor's impression of the reliability of the source and his analysis of the interview. These interviews are often data used in the audit. (Weigand Decl. 41).

(e) *Audit Reviewer Comments/Audit Checklist*. These documents reflect the supervisor's evaluation of the sufficiency and completeness of the auditor's work. They may include recommendations for additional work. (Weigand Decl. ¶ 42).

(f) *Auditor's Notes/Memos to File*. These documents reflect the auditor's thought processes and analyses throughout the audit. Auditor's notes may be made on source documents received from the contractor, and may be in the form of highlighting on documents used in the auditor's analysis. (Weigand Decl. ¶ 43).

(g) *Interoffice Memos*. These documents are communications among auditors on an audit team reflecting their comments and concerns during the audit process. (Weigand Decl. ¶ 44).

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(h) *Exit Meeting Notes*. These are notes made by auditors of comments made by Amtrak program management and the contractor at exit conferences. (Weigand Decl. ¶ 45).

(i) *Independent Review Checklist*. This document is prepared by the independent auditor who reviews the draft final audit report for accuracy and completeness. It may identify deficiencies in the audit and make recommendations about additional work or analysis needed. (Weigand Decl. ¶ 46).

(j) *Audit Survey Program*. Audit surveys are performed in selected audits to identify which areas of the contractor's work is likely to require auditing. These documents serve the same purpose as the Audit Program documents discussed above. (Weigand Decl. ¶ 47).

12. Weigand opined that release of the working papers would harm the ability of Amtrak OIG-Audits to do future audits, because the working papers would reveal information such as the audit sampling methodology and the internal controls used by Amtrak. (Weigand Decl. ¶ 39; TR. 37, 44-45, 63). The working papers would also reveal critiques of employees' work used for personnel actions at later time. (Weigand Decl. ¶ 42; TR. 57). Weigand expressed concern that release of the working papers would also result in auditors failing to document properly their work in future audits and would impair free and frank exchange of ideas among the auditors. (Weigand Decl. ¶¶ 39, 44; TR. 57-58).

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Decision Whether to Issue a Final Audit Report.

13. The audit working papers are not forwarded to Glowacki with the final draft audit report. (TR. 29-30). From time to time, Glowacki might review working papers from an audit in progress. (TR. 16, 42). Glowacki reviewed some working papers for the MOU II Acceleration Payment audit while the audit was being performed, but Weigand could not recall specifically which documents Glowacki reviewed. JR. 42). There is no evidence that Glowacki reviewed the working papers for any of the other audits at issue. (*See* TR. 15-16, 29-31): Therefore, I do not credit Weigand's statement that all of the audit working papers and audit reports created during each audit at issue assisted Glowacki in making his decision whether to issue a final audit report. (*See* Weigand Decl. ¶ 26).

14. There was no evidence that disclosure of draft audit reports and audit working papers would impair Glowacki's decision whether to issue a final audit report or impair the quality or candidness of the auditors' work that supported the audit report. (*See* TR. 39-40, 45).

Audit Reports.

15. The final audit reports admitted into evidence show that these documents follow the following standard format (Exs. 45, 47-49):

(a) *Executive Summary.* An overview of the facts leading to the audit and a summary of the audit results.

(b) *Introduction.* A factual statement of the events leading up to the audit request.

(c) *Scope.* A statement of the information to be analyzed, and a statement of the auditing standards to be applied.

(d) *Objective.* In most instances, a boilerplate statement that the objective was "to determine the accuracy and acceptability of the costs listed in the Contractor's proposal." In one instance it also included a statement regarding the evaluation of Amtrak's controls. (Ex. 47).

(e) *Methodology.* A statement of the documents to be examined, whether sampling techniques would be used, and whether the auditors would rely on source documents and interviews.

(f) *Special Circumstances.* A statement whether the audit was qualified and, if so, by what circumstances. This section was not included in each final audit report in evidence.

(g) *Prior Audits.* A statement whether prior audits had been conducted. This was not included in each final audit report in evidence.

(h) *Results of the Audit.* A statement of the conclusion reached by the audit.

(i) *Action Required.* A statement that no action was required or a statement of the time within which a response

to the audit must be made and the required format of the response. This section was not included in each final audit report in evidence.

(j) *Exhibits*. The final audit reports often have attached exhibits that provide a financial statement of the claimed items, the audited items, the questioned items and supporting explanatory notes.

Withheld Documents.

16. Kathleen Ranowsky, a Deputy Counsel in Amtrak OIG, and Beverly Walker, a paralegal in Amtrak OIG, reviewed documents responsive to the FOIA requests and created indices of withheld documents. (Ranowsky Decl. ¶¶ 1, 6; Walker Decl. ¶¶ 1, 7). Pursuant to my order, the indices group documents related to a given audit and state the date a final audit report was issued, if such a report was issued. (Doc. Nos. 202, 206). Amtrak claims only that each withheld document listed in the indices is exempt from disclosure pursuant to the deliberative process privilege within exemption 5.[2] (*Id.*). The only deliberative process Amtrak relies upon is the process by which Glowacki makes a decision whether to issue a final audit report. (TR. 12).

17. To determine whether there were any nonexempt factual portions of the withheld documents, Beverly Walker

2. The indices reflect some documents seeking advice from an attorney or from an attorney giving advice to Amtrak. Amtrak does not assert the attomey-client privilege or work product protection with respect to these documents.

reviewed the withheld documents regarding the following audits: REA 263 Structural Analysis for Catenary Bridge Attachments; REA 52.3; Moveable Bridges Allowance Item; Equipment Charges; Sales and Use Tax; Article 52 REA, Blocks 9 and 10. (Walker Decl. ¶ 7). Based upon Weigand's opinion that revealing factual documents, or factual portions of documents, would impair Amtrak's audit function[3], she determined that no factual materials among these withheld documents could be disclosed. (Walker Decl. ¶¶ 10-11).

18. To determine whether there were any nonexempt factual portions of withheld documents, Kathleen Ranowsky reviewed the withheld documents regarding the following audits: MOU II Acceleration Payment; Harmonic Filters Allowance Item; REA 311 Steel and Concrete Revisions to Precast Foundations; Hayward Baker Proposal Costs; Hayward Baker Termination Costs; REA 274 Suspension of Submarine Cable Installation; REA 120. (Ranowsky Decl. ¶ 6). She determined that there were factual documents or portions of documents related to these audits that could be released, as reflected in the indices. (Ranowsky Decl. ¶ 8). Based upon Weigand's opinion that revealing factual documents, or factual portions of documents, would impair

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3. There is no evidence that Walker has any personal knowledge of Amtrak's audit process or what factual material could be segregated from the audit documents. Walker spoke with many people to reach her decision on segregability of factual information, but of those people only Weigand presented evidence at trial. Because I found that the out-of-court statements relied on by Walker were hearsay, I consider her testimony only to the extent it is supported by the evidence Weigand presented in the declaration submitted at trial and in his testimony. (*See* Doc. No. 205).

Amtrak's audit function[4], Ranowsky determined that no factual materials among the remaining documents could be disclosed. (Ranowsky Decl. ¶¶ 8, 12).

II. CONCLUSIONS OF LAW.

> 1. Congress enacted the FOIA to enable the public to have access to government information unnecessarily shielded from public view. . . . The Act requires federal agencies to release requested information unless the information is covered by at least one of nine statutory exemptions. In keeping with the philosophy of broad disclosure underlying the FOIA, we interpret the exemptions narrowly. . . . Moreover, the government agency that seeks to withhold information bears the burden of proving that an exemption applies.

Nadler v. U.S. Dep't of Justice, 955 F.2d 1479, 1484 (11th Cir. 1992) (internal citations omitted). Although Amtrak is not a federal agency, it must comply with FOIA pursuant to statute. 49 U.S.C. § 24301(e).

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4. There is no evidence that Ranowsky has any personal knowledge of Amtrak's audit process or what factual material could be segregated from the audit documents. Ranowsky spoke with many people to reach her decision on segregability of factual information, but of those people only Weigand presented evidence at trial. Because I found that the out-of-court statements relied on by Walker were hearsay, I consider her testimony only to the extent it is supported by the evidence Weigand presented in the declaration submitted at trial and in his testimony. (*See* Doc. No. 205).

> 3. Exemption 5 protects from disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). To qualify, a document must thus satisfy two conditions: its source must be a Government agency, and it must fall within the ambit of a privilege against discovery under judicial standards that would govern litigation against the agency that holds it.

Dep't of Interior v. Klamath Water Users Protective Ass'n, 532 U.S. 1, 8 (2001).

4. The deliberative process privilege is one of the recognized discovery privileges falling within exemption 5. *Id.* The privilege protects "open and frank discussion among those who make [agency decisions] within the Government." *Id.* "The test that we apply under Exemption 5 'is whether the documents would be 'routinely' or 'normally' disclosed upon a showing of relevance.'" *Nadler*, 955 F.2d at 1490 (quoting *FTC v. Grolier, Inc.*, 462 U.S. 19, 26 (1983)).

5. Before the agency can withhold documents under the deliberative process privilege, it has the burden of proving the following with respect to each document or portion of a document withheld: "the document is (1) predecisional, i.e., 'prepared in order to assist an agency decisionmaker in arriving at his decision,' . . . and (2) deliberative, i.e., 'a direct part of the deliberative process in that it makes recommendations or expresses opinions on legal or policy matters.'" *Fla. House of Representatives v. U.S. Dep't of Commerce*, 961 F.2d 941, 945 (11th Cir. 1992) (internal citations omitted).

6. Documents that are final opinions and documents created after a decision is reached are not predecisional and, therefore, are not within exemption 5. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 151-54 (1975).

> 7. [P]urely factual material that does not reflect the agency's deliberative process generally is not protected. . . . Factual material may be withheld, however, when that material is so inextricably connected to the deliberative material that its disclosure would reveal the agency's decision making processes, . . . or when it is impossible to segregate in a meaningful way portions of the factual information from the deliberative information.

Nadler, 955 F.2d at 1491 (internal citations omitted); *accord EPA v. Mink*, 410 U.S. 73, 90 (1973).

8. In this circuit, the "fact/opinion distinction continues to be an efficient and workable standard for separating out what is, and what is not, deliberative." *Fla. House of Representatives*, 961 F.2d at 949. "The only inquiry that should be made in deciding whether something should be denoted opinion, and hence deliberative, is: Does the information reflect the give-and-take of the consultive process?" *Id.*

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Deliberative Process.

9. Moye O'Brien argues that the Amtrak OIG-Audits process is factual and investigative and that the decision to issue a final audit report is simply the ministerial act of reporting the results of the investigation. *See, e.g., Mink*, 410 U.S. at 89 ("Exemption 5 . . . requires different treatment for materials reflecting deliberative or policy-making processes on the one hand, and purely factual, investigative matters on the other."). I find, however, that the evidence established that Glowacki's decision whether to issue a final audit report involves more than a ministerial act of reviewing results of the audit and making sure the final audit report is in a proper form. The decision-making process includes making judgments about whether the final audit report is sufficient, in Glowacki's view, to meet the objectives of the audit, whether it reveals fraud or other improper activity that should be referred for investigation, and whether issuance of a final audit report is appropriate considering the significance and timeliness of the results of the audit.

10. I find that the evidence established that, by tendering a draft audit report to Glowacki, the Senior Director recommended to Glowacki that he issue the audit report. The evidence further established that Glowacki engaged in a give-and-take with the Senior Director and others about the information in the draft audit report. I find that Glowacki's consideration of the draft audit report and the give-and-take about the form of the final audit report is a deliberative process within exemption 5.

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Draft Audit Reports.

11. The draft audit reports are predecisional because they are recommendations from a subordinate to a superior of the form of final audit report that should be issued.

12. Disclosure of the revisions made to the draft audit reports may reflect Glowacki's deliberative processes. The indices reflect several instances in which Glowacki discussed draft audit reports with Amtrak program management and senior auditors before the final reports were issued. (*See, e.g.*, Equipment Charges Index, Bates Nos. 202460468, 202469-478; REA-263 Index, Bates Nos. 5007-009, 5010-012, 5013-015; Sales and Use Tax Index, Bates Nos. 202827-831, 202832-836, 202865-869; Moveable Bridges Allowance Item Index, Bates Nos. 203631-645).

13. The evidence established, however, that the draft audit reports have segregable factual information. The introduction and prior audits sections are purely factual recitations, and the scope and objectives are statements of established agency methodology. *See* Conclusions of Law 1 16, *infra*. Similarly, the portion of the exhibits stating the contractor's claimed or submitted costs are purely factual. None of these sections reflects any of the auditors' opinions or conclusions or any recommended audit findings. Therefore, these sections of the draft audit reports are not exempt from disclosure and must be disclosed.

14. Amtrak waived the deliberative process privilege each time it disclosed to the contractor information in a draft audit report during an exit conference. *See Fla. House of*

Representatives, 961 F.2d at 946 (An agency waives the deliberative process privilege when it voluntarily discloses information to non-federal party.). The evidence reflected that exit conferences were conducted with the contractor in four of the audits at issue. *See* Findings of Fact ¶ 5(b), (d), (e), (f). The evidence established that, at these exit conferences, Amtrak auditors provided the contractor with the proposed audit results, reviewed with the contractor each part of the draft audit findings, and disclosed to the contractor the audit results as set forth in the then existing exhibit to the draft audit report (the "audit-results exhibit"). Amtrak presented no evidence that showed which version of the draft audit report, if more than one version existed, were discussed at any of these exit conferences. Because Amtrak failed to carry its burden of proof regarding the scope of its waiver of the deliberative process privilege, I will assume that the audit-result exhibit to the draft audit report in existence before the date of the exit conference — and when there is more than one, the audit-result exhibit to the draft audit report dated nearest in time to the exit conference — was the exhibit disclosed to the contractor at the exit conference. Accordingly, I find that Amtrak's waived the deliberative process privilege as to the audit-result exhibit, including notes, and must disclose the audit-result exhibit that is part of the following documents: Harmonic Filters Allowance Item, Bates Nos. 202949-964; Moveable Bridges Allowance Item Index, Bates Nos. 203631-645; Hayward Baker Proposal Costs Index, Bates Nos. 204596-607; Hayward Baker Termination Costs Index, Bates Nos. 204825-835.

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Audit Working Papers.

15. The evidence established that the audit work preliminary to the creation of the draft audit report is investigative — gathering relevant data, and analytic — applying audit principles to the relevant data. There is no evidence that the auditors or their intermediate supervisors rendered opinions or made recommendations to Glowacki, the decisionmaker, during this part of the audit. There is no evidence that Glowacki reviewed any of the auditors' working papers after receiving the draft audit report from the Senior Director responsible for the audit. Therefore, I find that the information in the audit working papers was not directly involved in Glowacki's decision-making process.

16. Further, the working papers include factual information that forms the substance of the audit. Factual information is not exempt from disclosure. There is no evidence that revealing these facts would impair the process of deciding whether to issue a final audit report. Rather, Weigand opined that revealing the facts would impair Amtrak's ability to conduct future audits because it would reveal the audit methodology used by Amtrak. The audit methodology that may be revealed by disclosure of the audit working papers is a neither predecisional nor deliberative. The evidence established that the methodology is drawn from well-established auditing principles set forth in government and Amtrak auditing manuals. As such, the audit methodology contained in the audit working papers is an established agency policy that is not protected by the deliberative process exemption. *See, e.g., Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 868-69 (D.C. Cir. 1980) (explanations

of agency regulations to auditors held not protected by deliberative process exemption); *Jordan v. U.S. Dep't of Justice*, 591 F.2d 753, 774 (D.C. Cir. 1978) (prosecution guidelines and manual found to be "effective policy" of the agency and not protected by deliberative process privilege).

17. Amtrak asserts that the comments, recommendations, and opinions of auditors and supervisors contained in the audit working papers are, nevertheless, exempt under the deliberative process privilege. The privilege does not extend to all comments by and discussions among government employees. *See, e.g., Vaughn v. Rosen*, 523 F.2d 1136, 1143-47 (D.C. Cir. 1975); *see also In re Franklin Nat'l Bank Sec. Litig.*, 478 F. Supp. 577, 583-86 (E.D.N.Y. 1979) ("As a general rule the lower the level of the official making the observation and the lower the level of abstraction in the writing, the less the need for the privilege."). There is no evidence that the auditors' remarks in the working papers are so frank and candid that revealing them would chill the auditors' work in future audits. The only indication that the working papers may contain predecisional recommendations to Glowacki are documents sent to Glowacki before the final audit report was issued. (*See* MOU II Acceleration Payment Index, Bates Nos. 5335, 5297; Equipment Charges Index, Bates No 202542; REA 120 Index, Bates No. 20; Hayward Baker Proposal Costs Index, Bates No. 204552). Because these documents are predecisional and provided information to Glowacki, the decisonmaker, I find that revealing them may disclose Glowacki's deliberative process. Other than these documents, Amtrak did not present evidence that disclosure of the comments, recommendations and opinions reflected in the working papers would reveal Glowacki's decision-making process.

18. Amtrak also asserts that the working papers should be withheld because disclosure would reveal supervisors' evaluations of the work of auditors. Evaluations of employees' work is not a direct part of the deliberative process leading to the decision whether to issue a final audit report. As such, this reason does not support application of the deliberative process privilege to the working papers.

19. General discovery law supports a finding that the working papers are not protected by the deliberative process privilege. The deliberative process privilege is based on the premise that a federal agency should not be required to disclose information that would not be discoverable in a civil case in which the agency is a party. *Klamath Water Users Protective Ass'n*, 532 U.S. at 8. There is no federal accountant-client privilege. *United States v. Arthur Young & Co.*, 465 U.S. 805, 817 (1984). As such, auditors' working papers are normally discoverable in lawsuits in which the subject of the audit is relevant. *See, e.g., United States ex. rel. Irvin Indus., Inc. v. Goodyear Aerospace Corp.*, No. 87 Civ. 4444 (WK), 1991 WL 156388 (S.D.N.Y. Aug. 2, 1991) (required disclosure of Department of Defense draft audit reports to defendant company alleged to have made false claims regarding matters that were the subject of the audits); *see also Arthur Young & Co.*, 465 U.S. at 820 (requiring disclosure of audit workpapers to the IRS and noting that "if the SEC itself, or a private plaintiff in securities litigation, sought to obtain the tax accrual workpapers at issue in this case, they would surely be entitled to do so."); *In re S3 Ltd.*, 242 B.R. 872, 875-76 (E.D. Va. 1999) (required production of accountant's workpapers in contract dispute); *Peat, Marwick, Mitchell & Co. v. Creditor's Comm. of Northeast*

Dairy Coop. Fed'n, Inc., 65 B.R. 886 (N.D.N.Y. 1986) (ordered discovery of workpapers of auditor because they contained financial information relating to the affairs of the debtor company, but permitted auditor to withhold documents showing auditor's audit plan and procedures because auditor was not a party to the case); *Fein v. Numex Corp.*, 92 F.R.D. 94, 96-97 (S.D.N.Y. 1981) (required disclosure of nonparty accounting firm's workpapers in connection with audit of defendant's financial statements in securities fraud case). Even audit plans and methodology may be discoverable in lawsuits in which the auditor is a party. *See, e.g., Fields v. Oliver's Stores, Inc.*, No. 87 Civ. 0894, 1991 WL 44845 (S.D.N.Y. Mar. 2, 1990); *In re Crazy Eddie Sec. Litig.*, No. 87 C 0033, 1988 WL 127457 (E.D.N.Y. Nov. 18, 1988).

20. Therefore, I conclude that, except for the working papers addressed to Glowacki, discussed above, Amtrak failed to sustain its burden of proving that the withheld working papers are within the deliberative process privilege. Accordingly, Amtrak may no longer withhold, and must disclose, these working papers.[5]

Miscellaneous Documents.

21. Several documents withheld from production are responses to final audit reports or otherwise bear dates after the date that the applicable final audit report was issued. (*See* Sales and Use Tax Index, Bates Nos. 202824-826,

5. As to some of the working papers, any applicable privilege was also waived by disclosure of the document to third-parties. (Hayward Baker Termination Costs, Bates No. 204944-205053, 204791-795).

202843-857, 202424-426[6]; Moveable Bridges Allowance Item Index, Bates Nos. 203692-712, 202947-948; Hayward Baker Termination Costs Index, Bates Nos. 204847-849, 204772-774, 204775-779, 204782-783, 204789-790, 204791-795, 204807-808; MOU II Acceleration Payment Index[7], Bates Nos. 200241-242, 200244-246, 200579-580, 203171, 203173-178, 203189-190, 203348-351, 203577-579, 5246-50, 5654-57; REA-311 Index, Bates Nos. 64, 66, 97; Harmonic Filters Allowance Item Index, Bates Nos. 202240-242, 202013-014, 202015, 202038-039, 202965966). These documents are postdecisional, and they are not protected by the deliberative process privilege. *See* NLRB, 421 U.S. at 151-54. Amtrak may no longer withhold, and must disclose, these documents.

22. In one instance, Amtrak listed documents in an index but neither claimed an exemption nor stated that the documents had been disclosed. (*See* Hayward Baker Termination Costs Index, Bates Nos. 204820-824, 204825-835). Because no exemption has been claimed, Amtrak may no longer withhold, and must disclose, these documents.

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6. This document, described as "Reviewer Comments for the Sales Tax Audit," dated March 6, 2001, is listed in the Equipment Charges Index.

7. *See* Findings of Fact ¶ 5(a), *supra*.

Appendix D

III. CONCLUSION.

It is ORDERED that Moye O'Brien's oral motion for judgment in its favor as a matter of law is GRANTED in part and DENIED in part. It is further ORDERED that the following documents, or portions thereof, are exempt from production:

1. Draft audit reports, except as follows:

(a) the introduction, prior audits, scope and objectives sections and the contractor's claimed or submitted costs of these draft audit reports are factually segregable and must be disclosed; and

(b) the audit-results exhibit contained in each of the following documents must be disclosed: Harmonic Filters Allowance Item, Bates Nos. 202949-964; Moveable Bridges Allowance Item Index, Bates Nos. 203631-645; Hayward Baker Proposal Costs Index, Bates Nos. 204596-607; Hayward Baker Termination Costs Index, Bates Nos. 204825-835.

2. Working papers sent to Glowacki before a final audit report was issued, as follows: MOU II Acceleration Payment Index, Bates Nos. 5335, 5297; Equipment Charges Index, Bates No. 202542; REA 120 Index, Bates No. 20; Hayward Baker Proposal Costs Index, Bates No. 204552.

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It is further ORDERED that Amtrak is enjoined from withholding and is ordered to disclose within twenty days from the date of this order all other documents listed on the indices of documents withheld from its response to FOIA requests numbers 1 through 16.

At the close of all of the litigation in this matter, I will direct the Clerk of Court to issue a final judgment.

DONE and **ORDERED** in Orlando, Florida this 18th day of August, 2003.

s/ Karla R. Spaulding
KARLA R. SPAULDING
UNITED STATES MAGISTRATE

APPENDIX E — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DENYING PETITION FOR REHEARING FILED SEPTEMBER 14, 2004

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 03-14264-II

MOYE, O'BRIEN, O'ROURKE, HOGAN & PICKERT,

Plaintiff-Appellee,

versus

NATIONAL RAILROAD PASSENGER CORPORATION,

Defendant-Appellant.

On Appeal from the United States District Court for the Middle District of Florida

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC
(Opinion _____, 11th Cir., 19__, ____F.2d ____)

Before: TJOFLAT and HILL, Circuit Judges, and MILLS*, District Judge.

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* Honorable Richard Mills, United States District Judge for the Central District of Illinois, sitting by designation.

Appendix E

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

s/ [illegible]
UNITED STATES CIRCUIT JUDGE